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**INTERNATIONAL COMPETITION POLICY  
ADVISORY COMMITTEE  
TO THE ATTORNEY GENERAL  
AND ASSISTANT ATTORNEY GENERAL  
FOR ANTITRUST**

**FINAL REPORT**

**2000**

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AND ASSISTANT ATTORNEY GENERAL  
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FINAL REPORT

2000





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February 28, 2000

Over the last two years, we have had the great privilege of serving as the Co-Chairs and the Executive Director of the International Competition Policy Advisory Committee (the "Advisory Committee"). It is now our distinct pleasure to respectfully submit this Final Report to the Attorney General Janet Reno and the Assistant Attorney General for Antitrust Joel I. Klein.

This volume reflects the contribution of many individuals. We wish to extend our deepest appreciation for the support, encouragement and wisdom provided to the Advisory Committee by the Assistant Attorney General for Antitrust. He invited the Advisory Committee to think boldly about multijurisdictional mergers, international enforcement cooperation, and trade and competition policy issues with a view to improving approaches not only within the United States but also around the world over the medium term.

The Advisory Committee membership of distinguished individuals represent broad experience and expertise from U.S. business, industrial relations, academic, economic and legal communities. Committee members have vigorously debated and considered the international competition policy issues examined in this report. Members have been extremely generous with their time and support of this endeavor. We have been enriched by their participation and remain grateful for their many contributions.

The Advisory Committee undertook significant outreach efforts, which we would like to briefly acknowledge. The Advisory Committee held two sets of public hearings in the fall of 1998 and the spring of 1999. The hearings on November 2-4, 1998, involved 48 expert participants, including senior competition officials from around the world, lawyers, investment bankers, economists and academics from the United States, Australia, Brazil, Canada, the European Union, France, Germany, Japan, Mexico, Spain, and Venezuela.

A second set of hearings were conducted on April 22, 1999 and May 17, 1999, which provided an opportunity to hear from a number of business and trade associations who reported on the findings of special task forces that each had formed to consider issues under consideration by the Advisory Committee. The American Bar Association Section of Antitrust Law formed a task force chaired by Harvey Applebaum and Paul Victor, which formed three separate working groups: on Mergers and Joint Ventures, on Effectiveness of Private Litigation as an Enforcement Tool and on Enforcement Cooperation. Representatives from the ABA Antitrust Section also testified at the spring meetings. Members of the

International Antitrust Law Committee of the ABA Section of International Law and Practice also formed a task force chaired by Daryl Libow and Paul Crampton. That task force testified at the hearings and provided a written submission on the U.S. merger review process from the perspective of foreign parties. The Advisory Committee also heard from a number of business representatives from American Forest & Paper Association, The Business Roundtable, Eastman Kodak Company, Guardian Industries Corporation, the National Association of Manufacturers, United Parcel Service, the U.S. Chamber of Commerce, the U.S. Council for International Business, as well as presentations by representatives from The Brookings Institution, IMF, OECD, U.S. Agency for International Development and The World Bank. The International Bar Association as well as the International Chamber of Commerce submitted written comments on confidential information sharing and made a presentation at the spring hearings. In addition, a representative from the AFL-CIO presented that organization's views at an Advisory Committee meeting in July 1999. The full record of these proceedings is available on the Advisory Committee's webpage.

The Advisory Committee also undertook a number of other more targeted outreach efforts. For example, in the area of mergers, the Advisory Committee initiated a survey of some 18 mergers that were reviewed by antitrust authorities in more than one jurisdiction and sent letters soliciting input from lawyers and business executives associated with those transactions. To facilitate the Advisory Committee's consideration of U.S. and foreign technical assistance programs, the Advisory Committee invited individuals in the U.S. and abroad to share their perspectives on programs underway to foster the development of sound competition policy regimes around the world. A number of individuals responded with very useful input.

We also wish to extend our appreciation to those senior business executives, lawyers and other e-commerce experts that met with this Advisory Committee's e-commerce subgroup in June 1999 to exchange views and discuss the role of competition policy in the development of e-commerce and high technology markets.

Indeed, many other individuals provided the Advisory Committee with background papers and essays, for which we are extremely grateful. Two background papers undertaken by experts at the request of the Advisory Committee deserve special recognition. Professor William Kovacic of George Washington University School of Law prepared an excellent essay entitled "The Impact of Domestic Institutional Complexity on the Development of International Competition Policy Standards." And Professors Valerie Suslow and Simon Evenett prepared a stimulating essay entitled "Assessment of Empirical Literature on Cartels and Market Access." Several prominent economists offered insightful commentary on those papers.



There are many other individuals that have made significant contributions to the work of this Advisory Committee. Senior staff at the Department of Justice Antitrust Division as well as the Federal Trade Commission have generously responded to our many questions and requests for data and perspective.

We wish to extend our deepest appreciation to the staff of the Advisory Committee. Their professionalism and dedication to the work of the Advisory Committee has been extraordinary. Cynthia Lewis took lead responsibility for the chapters on multijurisdictional mergers. Andrew Shapiro had lead responsibility for trade and competition policy and e-commerce issues. Stephanie Victor had principal responsibility for the

examination of cartel and enforcement cooperation matters. Marianne Pak, the Advisory Committee's executive secretary has been a superb and efficient manager. We also wish to thank Eric Weiner, paralegal to the Advisory Committee. This project simply could not have been undertaken without their hard work and dedication. And finally, two individuals at Collier, Shannon, Rill & Scott deserve special mention, Sarah Bauers, Research Analyst, and Christine Wilson, an antitrust lawyer, for their substantial contributions.

Needless to say, the views expressed herein reflect the views of the Advisory Committee or certain individuals if so indicated, and do not necessarily reflect the views of any individuals acknowledged above.

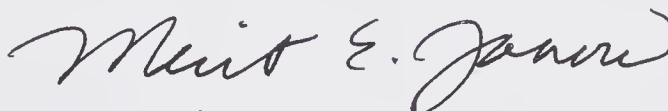
In closing, we hope that this Report will be of use to policy makers at home and abroad. Thank you Attorney General and Assistant Attorney General for Antitrust for providing us with this exciting opportunity to consider these issues on your behalf.



Paula Stern  
Co-Chair



James F. Rill  
Co-Chair



Merit E. Janow  
Executive Director







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# *Executive Summary*

## **CHAPTER 1 GLOBALIZATION AND ITS IMPLICATIONS FOR ANTITRUST COOPERATION AND ENFORCEMENT**

In the last several decades, more and more nations have come to recognize the value of competition as a tool for spurring innovation, economic growth, and the economic well-being of countries around the world. This recognition is evident in the economic liberalization that is taking place and in the dynamic technological change that is not only made possible by liberalization, but is itself an engine for liberalization. Both of these phenomena -- economic liberalization and technological development -- are in turn driving economic integration.

Competition policy can help to facilitate economic liberalization. If working properly, competition policy can produce more goods and services from scarce resources and provide a set of rules and disciplines that are not based on privilege and that are conducive to and responsive to efficient marketplace behavior.

A century ago, only the United States had comprehensive antitrust laws in place. Today, more than 80 countries have adopted antitrust laws, most of which were introduced in the 1990s. Yet, the emergence of competition policy regimes has not meant a uniformity of substantive rules or institutional approaches around the world. Competition policies of nations differ within a range that is in keeping with differences in legal systems. Moreover, even within established antitrust jurisdictions such as the United States, antitrust law evolves and changes. Technological development, the drive for competitiveness in the world environment, and economic analysis all contribute to changes in competition policy.

### **The Mandate of the International Competition Policy Advisory Committee**

What new tools, tasks, and concepts will be needed to address the competition issues that are emerging on the horizon of the global economy? To answer these questions, Attorney General Janet Reno and Assistant Attorney General for Antitrust Joel I. Klein formed the International Competition Policy Advisory Committee in November 1997. The Advisory Committee was asked specifically to give particular attention to three topics: multijurisdictional merger review; the interface of trade and competition issues; and future directions in enforcement cooperation between U.S. antitrust authorities and their counterparts around the world, particularly in their anticartel prosecution efforts. The reasons for these points of focus are quite clear. The large number of mergers being reviewed by a multitude of competition authorities, the international controversy over barriers to market access stemming from allegedly anticompetitive private barriers to trade, and the significant increase in the number of international cartel cases being prosecuted by the Antitrust Division have come to make these international matters of mainstream significance to U.S. antitrust policy. At the same time,



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some issues were consciously excluded from the Advisory Committee's work. For example, the Advisory Committee did not review domestic trade remedies, such as antidumping measures. In addition, the Advisory Committee did not address a variety of practices that may be reprehensible, illegal, or offensive under U.S. or foreign law or policy that can affect the nature of competition within a market or internationally. These include matters such as substandard wage and employment standards, the use of child labor, and lax environmental regulations, among others.

For two years the Advisory Committee, seeking the views of antitrust officials, businesses, scholars, practitioners, and other interested parties, has tried to identify initiatives that the U.S. Department of Justice and the U.S. government could undertake over the short and medium term and that would contribute to achieving the integration of markets through:

- *Increased transparency and accountability of government actions.*
- *Expanded and deeper cooperation between U.S. and overseas competition enforcement authorities.*
- *Greater soft harmonization and convergence of systems.*

### **The Global Economy and Competition Policy**

In considering competition policy and the international marketplace, a key challenge stems from the recognition that law is national but markets can extend beyond national boundaries. If markets are broader than national boundaries, are national laws and their enforcement sufficient to deal with the market problems of the new century? Further, is it possible to rely upon national law, yet at the same time work toward the development of a more seamless international system that facilitates the workings of global markets?

Of all these challenges, the international community has made the most headway in increasing cooperation and networking among the competition agencies of the world. International cartel enforcement and other forms of international enforcement cooperation in merger review are notable areas of success, particularly in recent years. Furthermore, both the number of bilateral antitrust cooperation agreements between the United States and other jurisdictions, and the number of new international initiatives have increased markedly. These cooperative solutions hold great potential, but, of course, it is predictably the case that they work well only when the cooperating agencies are jointly sympathetic to an approach regarding the particular antitrust enforcement matter.

A second challenge is now being observed: with more than 60 nations now having antitrust merger control laws that require (or provide for) antitrust notification, the overlapping regulations are at times unduly burdensome and costly to the merging parties and can cause unnecessary frictions between nations. The question arises whether the systems can be rationalized and still ensure that enforcers have the tools necessary to identify and remedy anticompetitive transactions.



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A third challenge is linked to the world trading system itself and the promise of open markets: Nations may promise open markets as far as the state is concerned and undertake substantial liberalization commitments with respect to governmental practices, but at the same time allow, by action or inaction, blockage of their markets by firms' anticompetitive restraints. If there is an international interest in removing those restraints and thus freeing up the world markets, can this interest be fully satisfied by national antitrust law? Is a new approach needed that does not split the state role from the private role and that does not test the limits of national jurisdiction?

In addressing these challenges, the Advisory Committee has considered the role for competition policy in the global economy broadly and with a view to improving approaches not only within the United States but also around the world. This Report considers problems that transcend nations, problems within individual nations, and problems between particular systems. It is not possible to predict how the global economy will evolve, but this Report starts from the premise that the United States should try to provide an environment conducive to the further expansion of international commerce, tolerant of the diversity of nations with respect to their own evolving law, and hospitable to the enhancement of world welfare.

### **CHAPTERS 2 AND 3 MULTIJURISDICTIONAL MERGERS**

Competition issues raised by the growth of cross-border trade and investment and the simultaneous proliferation of antitrust merger control laws are at the cutting edge of economic globalization. The world currently is experiencing an unprecedented level of merger activity. In 1999 global mergers and acquisitions were at an all-time high, with approximately \$3.4 trillion in activity announced worldwide. As the volume of international merger activity has increased, so too has the number of jurisdictions around the world with antitrust merger control laws. Merging parties with international business operations potentially must review their sales, assets, subsidiaries and market shares in more than 60 jurisdictions to determine whether notifications to the competition authorities in those jurisdictions are necessary or advisable. These trends make it increasingly likely that mergers involving firms doing business in several jurisdictions will be reviewed by multiple competition authorities. It is not unheard of for merging parties to file antitrust notifications with a dozen or more jurisdictions.

The spread of merger control law has the potential to create significant benefits. Merger review regimes with notification requirements give competition authorities the ability to identify and remedy potentially problematic transactions, thereby benefiting consumers and competition. At the same time, the growing tendency of nations to apply their laws to offshore mergers and the sheer volume of law that firms undertaking mergers must now consider present challenges for the merging parties and for the reviewing authorities. These challenges range from dealing with heightened uncertainty and increased transaction costs to ensuring consistent outcomes and compatible remedies.

In Chapter 2 the Advisory Committee considers ways to bridge the differences between systems and minimize the risk that differing substantive standards will give rise to diverging evaluation on the merits of a transaction, incompatible or burdensome remedies, and international friction. The unifying theme of these recommendations is that cooperation among antitrust enforcement authorities is not only desirable, but necessary if the challenges in this arena are to be addressed effectively.

Chapter 3 examines those problematic features within merger review systems that give rise to uncertainty and unnecessary transaction costs. The Advisory Committee believes that an improved environment for mergers globally is where individual merger control regimes focus on those transactions that raise competitive concerns within their territory and refrain from unduly burdening transactions, particularly those that lack anticompetitive potential.

## **CHAPTER 2**

### **STRATEGIES FOR FACILITATING SUBSTANTIVE CONVERGENCE AND MINIMIZING CONFLICT**

Inconsistent outcomes and conflicting or burdensome remedies imposed by multiple jurisdictions may significantly increase transaction costs. In the worst-case scenario these burdens may result in the abandonment of transactions that are procompetitive. Although much attention has been focused on the potential for divergent outcomes when proposed transactions are reviewed by multiple agencies, multijurisdictional merger review for the most part has resulted in consistent outcomes and compatible remedies. The possibility of divergent outcomes will remain, however, as long as underlying substantive differences in merger control law exist and multiple agencies continue to review a single transaction.

The Advisory Committee believes that these challenges can best be addressed by facilitating, where possible, substantive harmonization and convergence among merger review regimes. Complete harmonization and convergence will be achieved only in the long run, if ever. This point should not, however, deter policymakers from taking steps to support and facilitate efforts at harmonization and convergence both in the short and medium term.

There are at least three concrete areas where nations can take steps to facilitate the convergence process and further minimize transaction costs and conflicts: Facilitating greater transparency; developing disciplines to guide the review of mergers with significant transnational or spillover effects; and continuing to enhance cross-border cooperation. In addition, the Advisory Committee recommends a number of approaches to *work sharing* to deepen cooperation further and to develop more seamless merger review systems internationally.



### Facilitate Greater Transparency

One of the first steps toward facilitating greater substantive convergence is the development of a better understanding of each jurisdiction's framework for analyzing proposed mergers. This process would highlight differences in merger control laws and could stimulate international discussion and adjustments. The Advisory Committee discusses several steps to improve transparency:

1. Greater transparency in the application of each jurisdiction's merger review principles could be enhanced by the *publication of guidelines and notices* explaining the manner in which mergers will be analyzed; *annual reports* (including case examples), *statements, speeches, and articles* describing changes in relevant legislation, regulations, and policy approaches; and *case-specific decisions, releases, and press interviews*.
2. At a multinational level, greater transparency may be achieved by conducting a survey and compiling an explanatory report of all jurisdictions with merger regulations to identify the principles they employ.
3. Each jurisdiction also should facilitate achievement of greater transparency by articulating clearly its rationales for challenging, or refraining from challenging, *significant* transactions (that is, decisions that set precedent or otherwise indicate a shift in doctrine or policy).

### Develop Disciplines for Merger Review

Nations should work together to develop what this Advisory Committee calls *disciplines* that nations could usefully agree upon to guide the review of mergers with significant transnational or spillover effects. The Advisory Committee outlines disciplines that are simple yet aspirational and may not be feasible to implement in many jurisdictions at this juncture. The Advisory Committee believes, however, that if disciplines are adopted, they should be set at a high standard. That is, these disciplines are designed to promote best practices under any system as opposed to creating rules that would bring about convergence to the "lowest common denominator." What follows are intended to be illustrative and applicable to all jurisdictions with competition regimes. Other principles of law as well as disciplines can and should be developed through international discourse.

1. Nations should apply their laws in a nondiscriminatory manner and without reference to firms' nationalities.
2. As a best practice or discipline, with limited exceptions (such as national security), noncompetition factors should not be applied in antitrust merger review. If a jurisdiction's law recognizes noncompetition factors (such as preservation of jobs, promotion of exports, or international comparative advantage), such factors should be applied transparently and in

## *Executive Summary*

a manner narrowly tailored to achieve their ends. Further, if a jurisdiction's merger regime explicitly permits noncompetition factors to trump traditional competition analysis, those noncompetition factors should be applied after the competition analysis has been completed.

3. Competition agencies do not operate in a political vacuum, but enforcement agencies must nonetheless establish their independence, and "parochial" political concerns should not play a role in the merger review process.
4. Nations should recognize that the interests of competitors to the merging parties are not necessarily aligned with consumers' interests. Accordingly, authorities should minimize the problems that may arise in competitor-driven processes, including the disruption of potentially procompetitive mergers.
5. When a transaction has a significant anticompetitive effect on the local economy in any given jurisdiction, the local antitrust authority has a legitimate interest in reviewing the transaction and imposing a remedy notwithstanding the fact that the transaction's "center of gravity" (whether determined by reference to the nationality of the parties, location of productive assets, or preponderance of sales) lies outside its national boundaries. At the same time, in the face of a clash between jurisdictions, remedies with extraterritorial effects should be tailored to cure the domestic problem. Further, when fashioning a remedy with extraterritorial effects, the agency should take into account local practices and procedures in the foreign jurisdiction.

### **Continue to Enhance Cross-Border Cooperation**

To advance substantive convergence in the near term, and avoid or minimize divergent analyses and outcomes, it is important for the United States and other jurisdictions to encourage and further deepen cross-border cooperation in reviewing mergers. Cooperation among reviewing authorities could be enhanced if all jurisdictions were to establish a transparent legal framework for cooperation that contains appropriate safeguards to protect the privacy and fairness interests of private parties. This Advisory Committee has identified several key features of such a framework.

1. In the U.S. context, a framework for cooperation might entail the development of a *Protocol* with a combination of key features: a description of the way the federal antitrust enforcement agencies in the United States conduct cross-border coordinated merger investigations; model waivers permitting discussions otherwise prohibited by confidentiality laws and authorizing the exchange of statutorily protected information between competition authorities during a merger review; and a policy statement outlining safeguards established in a reviewing jurisdiction to protect confidential information. Other jurisdictions usefully could develop comparable protocols.



2. The idea behind the model waivers is that they would not impose on an agency any obligations beyond acting in accordance with its normal practices and confidentiality rules (as described in its policy statement). To instill further confidence, however, agencies using confidentiality waivers should affirm in the policy statement the agency's intention to refuse to disclose information except to the extent it is legally required to do so, to use best efforts to resist disclosure to third parties (including the assertion of any privilege claims or disclosure exemptions that may apply), and to provide such notice as is practicable before disclosing to a third party any confidential business information obtained pursuant to a waiver. The policy statement also should explain how concepts such as using best efforts to resist disclosure to third parties are implemented in the jurisdiction.
3. Jurisdictions also should consider adopting a policy to provide notice to a party -- either before or after the fact -- when they share documents of that party with another jurisdiction. The Advisory Committee can well understand why an enforcement agency would be unwilling to agree to a blanket commitment to provide notice. However, when an agency has the authority to exchange information and adverse enforcement consequences are not present, then notice to the parties seems reasonable and proper. Alternatively, parties could provide select documents directly to other reviewing jurisdictions and waive confidentiality with respect to those documents or identify beforehand which documents or categories of documents may and may not be shared, although in certain cases this approach might limit the benefits that potentially could be realized through the cooperative process.

<b>Develop Work-Sharing Arrangements</b>
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Looking to the future, the Advisory Committee believes that the international community should be striving to develop more nearly seamless merger review systems internationally, and particularly with those jurisdictions that have mature merger review regimes. The most integrated approach the Advisory Committee envisions is *work sharing* in cases in which the enforcement efforts of one agency are likely to be sufficient to remedy the antitrust concerns of other jurisdictions. Work sharing may be accomplished in incremental steps with each step reflecting a different degree of cooperation and each step built upon successful approaches to cooperation and coordination that enforcement authorities have already implemented. An important objective is to reduce duplication, while preserving the right for the United States and other jurisdictions to take their own measures, as necessary.

Work sharing logically could begin between the United States and the European Union because of their record of cross-border cooperation and the amount of transatlantic merger activity occurring that has its main impact in the United States and Europe. Further, working toward a common position on merger review policy with the European Commission should be a priority. The Advisory Commission envisions the development of work-sharing arrangements along these lines:

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1. *In a first step, each jurisdiction conducts its own review of the proposed transaction and participates in the formulation, if not the negotiation and implementation, of remedies.* Under this approach, some or all reviewing jurisdictions would jointly negotiate remedies with the merging parties, while each would implement its own consent decree that incorporates the jointly negotiated remedies. In some cases it may be feasible for one jurisdiction to negotiate remedies with the merging parties that will address concerns of both that jurisdiction and other interested jurisdictions. Such cooperation and coordination at the remedies phase has been successfully employed in several cases, and the Advisory Committee believes that these approaches should be emulated in future cases whenever the legal and factual situations indicate that such coordination and cooperation will be useful.
2. In appropriate cases, it may be feasible to take cooperation to the next level and *limit the number of jurisdictions conducting second-stage reviews* of a proposed transaction. For example, where the concerns of Country A are likely to be the same as and subsumed by the concerns of a more distinctly affected investigating jurisdiction, it may be appropriate for Country A to refrain from independent investigation. At present, such an arrangement may not always be feasible in an environment with statutorily mandated review periods if the agency could lose the right to review the transaction at all. This approach likely would preclude a jurisdiction from being able to negotiate its own remedies if it felt that the preceding jurisdiction did not adequately address its concerns or imposed a remedy that diverged from its approach. Such impediments would have to be resolved if this degree of cooperation were to become feasible in more than a handful of cases. In the meantime, this approach may be useful in situations in which there is no available remedy to the reviewing jurisdiction or there is a sufficient level of confidence in the reviewing jurisdiction.
3. One way to safeguard against this possibility is to ensure sufficient participation in the process by the other jurisdictions. One jurisdiction would *coordinate the investigation* of a proposed transaction, take into account the views of each interested jurisdiction, and recommend remedies to address the concerns of all interested jurisdictions. The assessment of the coordinating agency would be binding on the coordinating agency but either could serve as a recommendation to other interested jurisdictions (with a presumption in favor of accepting the coordinating jurisdiction's recommendation) or could be binding on those jurisdictions as well.
4. The Advisory Committee considered whether, given a sufficient amount of substantive and procedural convergence among merger review regimes, an even higher level of work sharing might be feasible someday. At this advanced level of work sharing, the coordinating agency would evaluate procompetitive and anticompetitive effects of a proposed transaction on a global scale, taking into account all of the merger's costs and benefits to competition, not only the net effects within its borders. The coordinating jurisdiction could then design remedies to address the concerns of all interested jurisdictions.



This advanced level of work sharing is a distant vision. At present, it is the view of this Advisory Committee that while no agency should be obligated to take into consideration competitive harm or benefits that may be achieved outside the reviewing jurisdiction, competition authorities should consider that the transactions they review also have the potential to generate spillover effects in other jurisdictions. As the level of convergence in antitrust enforcement increases, however, agencies should consider analyzing the benefits and anticompetitive effects of a proposed transaction on a global scale.

### **CHAPTER 3**

## **RATIONALIZING THE MERGER REVIEW PROCESS THROUGH TARGETED REFORM**

Many of the transaction costs imposed by merger regimes are rationally related to the efficient review of transactions that have the potential to create appreciable anticompetitive effects within the reviewing jurisdiction and therefore should be taken in stride by companies as a cost of doing business. At the same time, the Advisory Committee believes that while merger regimes have the potential to create benefits for society, those same review processes also impose significant transaction costs on international transactions. It is therefore important to focus on those *unnecessary* and *unduly burdensome* costs imposed by merger control regimes that have little or no relationship to antitrust enforcement goals.

This second category of proposed reform efforts seeks to reduce transaction costs by rationalizing the merger review process through targeted problem solving in individual merger regimes. Broadly speaking, the Advisory Committee identifies a number of best practices that fall within two major categories: ensuring that each jurisdiction's merger review regime examines only those mergers that have a nexus to and the potential to create appreciable anticompetitive effects within that jurisdiction; and ensuring that each jurisdiction refrains from unduly burdening those transactions during the course of the merger review process. At the same time, these reform efforts seek to ensure that the antitrust authorities have the tools needed to identify and remedy anticompetitive mergers.

### **Casting the Merger Review Net Appropriately: Notification Thresholds**

The Advisory Committee has learned that one significant category of unnecessary transaction costs stems from the overly broad application of merger control law that relies on exceedingly low notification thresholds and that requires antitrust notification of transactions in the absence of any appreciable domestic effects. To complicate matters, many jurisdictions' filing requirements are vague, subjective, or difficult to interpret. The Advisory Committee recommends several *best practices* that jurisdictions can use, where necessary, to refine threshold tests for notification. These practices are designed to reduce unnecessary transactions costs without significantly reducing the public benefit from advance notification.

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1. In establishing its premerger notification thresholds, each jurisdiction should seek to screen out mergers that are unlikely to generate appreciable anticompetitive effects within the reviewing jurisdiction.
  - This screening can be achieved, first, by implementing threshold tests that require an *appreciable nexus to the jurisdiction*, such as transaction-related sales or target assets in the jurisdiction.
  - Second, jurisdictions should set notification thresholds *only as broadly as necessary* to ensure the reporting of potentially problematic transactions. If an indexing mechanism is not employed, the Advisory Committee recommends that jurisdictions review their notification thresholds periodically (at least every four years) to determine whether they should be adjusted.
2. Additional steps that can be taken at this stage to reduce costs for international mergers include establishing objectively based notification thresholds and ensuring their transparency.
3. To better ensure that potentially anticompetitive transactions do not escape scrutiny under merger review systems, the Advisory Committee recommends that competition authorities be given the authority to pursue potentially anticompetitive transactions even if those transactions do not satisfy notification thresholds. Although the federal antitrust agencies in the United States already possess this authority, many existing merger regimes authorize regulators to review transactions only when notification requirements are satisfied.
4. Any efforts to revise notification thresholds also must consider filing fees, which currently constitute a significant source of revenue for numerous competition authorities, including the federal antitrust agencies in the United States. Ideally, no competition agency should be dependent on filing fees for its budget or staff salaries. To ensure that these competition authorities will be able to pursue their enforcement missions vigorously, it is imperative to provide agencies with alternative sources of funding to offset the loss of any funds that may result from revising notification thresholds or “delinking” filing fees from agency budgets.

### Reducing Burdens on Transactions that Come within the Merger Review Net

Detailed filing requirements and long review periods may impose significant and sometimes unnecessary or unduly burdensome costs on proposed transactions, particularly those that pose no harm to competition. Further, lengthy or indefinite review periods coupled with differing events triggering when a filing may (or must) be made may complicate cooperation among reviewing authorities and heighten uncertainty with respect to transaction planning. To ensure that each jurisdiction refrains from unduly burdening transactions that trigger a notification obligation, merger review should be conducted in a two-stage process designed to enable enforcement agencies to



identify and focus on transactions that raise competitive issues while allowing those that present none to proceed expeditiously.

<b>Review Periods and Timing</b>
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1. The first stage should be conducted within a maximum review period of one month. In many jurisdictions the initial review and waiting period generally runs for either 30 days or one month following notification. By contrast, the initial review period in several other jurisdictions substantially exceeds this base line or is undefined. ICPAC hearings testimony suggests that marginal differences in the initial review periods are inconsequential since they are manageable from a transaction planning standpoint. Reform efforts should focus, therefore, on jurisdictions in which the initial review period either is undefined or substantially exceeds the 30 day-one month baseline.
2. Jurisdictions that are unable to conclude investigations before the expiration of the initial or second-stage review periods also should be given authority to grant early termination (for example, for transactions that raise no substantive issues or in which the parties are willing to resolve concerns through consent decrees or undertakings).
3. To permit merging parties to coordinate multijurisdictional filings in the most efficient manner and to facilitate cooperation among reviewing authorities, the international community should promote harmonization of rules pertaining to when parties are permitted to file premerger notification. This harmonization can be achieved by targeting reform efforts in jurisdictions with definitive agreement requirements and postexecution filing deadlines so as to permit filings at any time after the execution of a letter of intent, contract, agreement in principle, or public bid.
4. For transactions that raise serious competitive issues and require a more in-depth review, the Advisory Committee concludes that merger review should not be an open-ended process and that companies derive value from certainty with respect to merger review periods. The Advisory Committee believes more deadlines should be employed to provide greater certainty and that jurisdictions with lengthy or open-ended review periods should adopt more expedited time frames for review. The Advisory Committee made a number of suggestions in the U.S. context to address these concerns. One possibility is nonbinding but notional time frames for second-stage review that vary in relation to the relative complexity of the transaction.

<b>Notification Forms and Information Requests</b>
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1. While the Advisory Committee acknowledges that agencies have a legitimate interest in requiring the submission of information sufficient to ensure that they are able to identify potentially anticompetitive transactions, some jurisdictions impose very substantial and unnecessary burdens through the use of very detailed filing forms. In these jurisdictions, voluminous filings are required for all transactions, including those that pose no harm to competition. To ensure that transactions that trigger notification obligations are not burdened with excessive information requirements, while at the same time giving competition authorities enough information to identify competitively sensitive transactions, the Advisory Committee recommends that initial notification require the minimum amount of information necessary to make a preliminary determination of whether a transaction raises competition issues sufficient to warrant further review.
2. Recognizing that there is a trade-off between the amount of information initially provided and the time frame in which clearance is to be granted, mechanisms also should be established to narrow the legal and factual issues presented by mergers as early in the review process as possible. One way to accomplish this goal would be to provide a short form-long form option, leaving it to the notifying parties to choose in the first instance which form to use. Alternatively, reviewing authorities may encourage merging parties to provide additional information voluntarily, allowing the authorities to resolve any potential antitrust issues quickly or conduct a focused second-stage inquiry that narrowly targets the antitrust issues.
3. Initial filing requirements in many jurisdictions may be statutorily imposed, and revising these requirements through legislative action may be time consuming. Until reform efforts can be achieved, the Advisory Committee recommends that jurisdictions consider permitting parties to submit an affidavit or letter (in lieu of a notification) alleging brief facts explaining why the transaction does not raise competitive concerns.
4. To facilitate quick resolution of potentially problematic transactions deemed worthy of further investigations and focus the issues as soon as possible, there is no substitute for frank information exchange between competition authorities and the parties to a proposed transaction. To that end, each reviewing authority should articulate to the merging parties at the beginning of a second-stage inquiry the competitive concerns that are driving the investigation. This summary could be conveyed orally or in writing.
5. Competition authorities around the world could assess their own performance with respect to those transactions they challenge. One way to do this is to conduct an *after-the-fact audit* of merger challenges to examine in great detail decisions to prosecute, or to refrain from prosecuting, specific matters. The audit also could examine the types of information collected during each investigation. The aim of these audits lies in obtaining an objective



and frank assessment of performance in previous investigations, thereby laying the groundwork for improvement in future cases. Audits could be conducted internally in more mature merger regimes or by a group of outside observers in newer regimes.

6. A great deal also can be gained from multilateral efforts to achieve soft procedural harmonization of the type undertaken by the Organization for Economic Cooperation and Development (OECD). The United States should continue to support OECD efforts to further develop a common framework for merger notification, including the development of common definitions. In addition, the OECD should continue to focus its efforts on identifying the minimum information necessary to identify whether mergers raise competitive issues as well as to specify categories of data that may be useful to narrow or resolve potential issues early in the process. As part of this effort, consideration also should be given to ways to reduce unnecessary burden, including translation costs, overly burdensome certification, and other procedural requirements.

### **Targeted Reform Efforts in the United States**

In Chapter 3 the Advisory Committee recommends a number of practices designed to rationalize the application of merger review procedures. The Advisory Committee believes that the United States should play a leading role in the effort to implement these proposed reforms in the international arena. Perhaps one of the most effective ways in which the United States can stimulate global reform is leading by example. It is therefore important that the United States examine its own merger review system in an attempt to identify and correct those aspects of the system that create uncertainty and unnecessary transaction costs. The applicability of the practices recommended in Chapter 3 to the United States is discussed below.

### **Targeted Reform in the United States: Notification Thresholds**

The Hart-Scott-Rodino Act (HSR) and implementing regulations that spell out the U.S. merger review process already use exemptions from HSR reporting requirements for certain transactions involving non-U.S. companies (foreign person exemptions) to ensure that the U.S. authorities are notified only of transactions with a nexus to the jurisdiction. In addition, the notification thresholds are objectively based. Finally, the U.S. antitrust agencies ensure the transparency of these thresholds and their application by offering guidance to practitioners and businesses through published rules and regulations, guides, speeches, and press releases, and through the Federal Trade Commission (FTC) Premerger Office's provision of advice.

The foreign person exemptions, however, have not been adjusted for many years. Thus, the Advisory Committee recommends that the FTC review the scope and level of the HSR exemptions for transactions involving foreign persons to ensure that the U.S. authorities are notified only of transactions with an appreciable nexus to the United States. A final area that deserves attention

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concerns ensuring that the notification thresholds are only as broad as necessary to identify transactions that have the potential to generate appreciable anticompetitive effects within the United States.

1. The thresholds currently employed by the premerger notification system in the U.S. deserve careful review. While recognizing that small transactions are not necessarily competitively benign, the Advisory Committee finds that the notification thresholds currently employed in the United States are too low and capture too many lawful transactions.
2. The most straightforward way to decrease the number of required filings while not materially compromising the agencies' enforcement mission is to increase the size-of-transaction threshold for acquisitions of both voting securities and assets. One method for raising the threshold lies in adjusting for inflation, with periodic future adjustments for inflation. Depending on the base year and deflator used, increasing the size-of-transaction threshold commensurate with inflation would mean increasing the threshold in the \$33 million to \$43 million range when measured in 1998 dollars. The majority of the Advisory Committee recommends raising the thresholds within this range, although three members advocate raising the size of the transaction threshold even higher, to \$50 million.
3. An indexing mechanism has many benefits, but an *automatic* indexing mechanism also may produce arbitrary results. If an automatic indexing mechanism is not employed, the Advisory Committee recommends that the notification thresholds be reviewed periodically to determine whether they should be adjusted.
4. The Advisory Committee believes that, ideally, filing fees should be delinked from funding for the agencies. A linkage of this nature may skew incentives to revise notification thresholds because of collateral fiscal effects. Another risk is that the ability of the agencies to fund their law enforcement activities may be compromised when the current merger wave subsides. However, because filing fees currently provide 100 percent of the U.S. agencies' enforcement budgets, sufficient funds must be available from other sources before any effort to delink filing fees or raise thresholds occurs. It is critical to the agencies' enforcement mission that resources are not reduced. The antitrust agencies' enforcement efforts could be directly funded from general revenue or indirectly in a variety of ways including increasing the filing fee, creating a sliding scale fee, or assessing a fee based on the amount of work performed by the agencies (although these latter alternatives would not accomplish delinking the budget from fees).

### **Targeted Reform in the United States: Review Periods and Timing**

The Advisory Committee commends the flexibility of the U.S. premerger notification system, which permits filing at any time after the execution of a letter of intent, contract, agreement in principle, or public bid. In addition, the Advisory Committee commends the fact that the U.S.



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competition authorities resolve approximately 97 percent of all notified transactions within the initial 30-day review period. Thus, no reform of the U.S. triggering event or initial review period is needed. The second-stage review process can, however, be improved.

1. A consensus exists among Advisory Committee members on the need for certainty in merger review periods and that merger review should be conducted within reasonable time frames. Advisory Committee members are not of a shared view on the appropriate mechanisms for addressing these concerns, however. Some members of the Advisory Committee believe that fixed maximum review periods are necessary to provide certainty and discipline in the merger review process. Most members of the Advisory Committee feel this would be extremely difficult to achieve under the U.S. system and might result in enforcement errors. There also is concern that maximum time periods would effectively turn into standard or minimum review periods. A majority of Advisory Committee members therefore eschew strict time periods but recommend that alternative steps be taken to provide the greater certainty required for effective transaction planning. For example, the agencies could employ nonbinding but notional time frames for second-stage review that vary in relation to the relative complexity of the transaction.

### **Targeted Reform in the United States: Notification Forms and Information Requests**

The Advisory Committee believes that with modest exceptions, the HSR notification form requests only the information required by the agencies to identify competitively sensitive transactions. In other instances, however, it appears that revisions to the HSR form could enhance the agencies' ability to identify potentially problematic transactions. The Advisory Committee also believes that it is important for the U.S. agencies to implement measures to address some of the problems perceived by the business community and the private bar with respect to the second-request process.

1. The Advisory Committee encourages the FTC to implement changes that better focus the HSR form. In addition, the Advisory Committee recommends that the agencies formalize their current practices that encourage merging parties voluntarily to provide additional information at the initial filing stage in an effort to resolve potential issues without the issuance of a second request. One way to formalize the process is to create an optional long form. Another way lies in creating a model voluntary submission list that identifies the categories of data that merging parties usefully may submit in facially problematic cases.
2. Another useful practice that should be formalized is that of permitting the merging parties voluntarily to withdraw and refile within 48 hours the acquiring person's HSR form (without having to pay another filing fee) in order to give the agencies additional time to resolve the matter without having to issue a second request. In appropriate cases of this nature, the agencies should alert parties to the option of withdrawing and refiling the HSR notification. Publishing statistics on the number of successful (and unsuccessful) attempts to avoid a

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second request by withdrawing and refiling a notification would demonstrate the viability of this option.

3. When they issue a second request, the agencies should provide the merging parties (either orally or in writing) with their reasons for not clearing the transaction within the initial review period. An explanation of the substantive concerns prompting the second request will facilitate transparency in the merger review process and will expedite the process by further enabling the merging parties to focus on and respond to the agencies' concerns. Further, it will assist parties in understanding that the second request rests on genuine substantive concerns. In designing second requests, moreover, the agencies should avoid overly broad requests and instead tailor their requests for additional information to the issues prompting the need for further review.
4. In 1995 the agencies announced that they had addressed concerns about the second-request process by adopting a model second request. The predominant view of ICPAC hearing participants, among others, however, is that this reform helped reduce burdens only marginally. In attempting to identify the appropriate components of an effective model second request, one useful project might be an internal after-the-fact audit of select merger challenges. Such an audit could consider whether the agencies are requesting the right types of information and whether this information was subsequently used at trial (and whether discovery tools were sufficient). Perhaps the answers to these questions would enable the agencies to revise their model second request to reduce compliance burdens on businesses.
5. Merging parties and agency staff frequently are able to negotiate modifications to the scope of second requests. The level of willingness to engage in productive negotiations of this nature appears to vary among staff members and counsel for merging parties, and modification requests are sometimes not resolved in a timely fashion. In an attempt to institutionalize productive modification negotiations, the Advisory Committee recommends that the agencies impress on staff the importance of being open to negotiating modifications to the scope of second requests and to do so in a timely fashion. Success in this endeavor also requires merging parties and their advisors to cooperate.
6. When modification negotiations break down, parties should be encouraged to use the appeals process, which currently is used hardly at all. To this end, the Advisory Committee recommends that the agencies implement measures to make the appeals procedure more attractive to merging parties by making the process more expeditious, making its outcome more transparent, and actively encouraging merging parties to use the process. Agencies and parties also should involve direct supervisory officials in the modification negotiation process, when necessary.
7. The Advisory Committee also considered ways to reduce foreign productions and translation requirements. The agencies should continue their current practice of permitting parties, in



appropriate cases, to provide summaries of documents and produce full translations of only those documents the agencies deem particularly relevant to the inquiry. However, the parties should not as a matter of course be required to forgo a defensible market definition in order to take advantage of this practice. The Advisory Committee recommends that in appropriate cases, the agencies consider whether the selection of the specifications that apply to foreign offices could be limited to those that are directly relevant to the geographic market or that seek documents that pertain to the specific competitive concerns at issue.

### Targeted Reform in the United States: Multiple Review of Mergers

The Advisory Committee has identified overlapping responsibilities for review of mergers in the United States as an area warranting consideration in its examination of international competition policy. In the United States, a decision by the DOJ or FTC in a specific transaction does not preclude subsequent or parallel competition reviews, nor does it determine the outcome of such proceedings. Federal and state legislatures and judicial decisions have empowered a wide array of public and private parties to challenge mergers, acquisitions, and joint ventures on competition grounds.

Concurrent jurisdiction among multiple domestic agencies has the potential to generate inconsistent policy approaches within a single jurisdiction. As a result, it can make global harmonization efforts and cross-border cooperation more difficult. In addition, it imposes heightened uncertainty as to timing and outcome and further increases transaction costs. In its deliberations, the Advisory Committee identified a number of possible policy approaches to address these issues. These proposals ranged from granting exclusive federal jurisdiction to determine competitive consequences of mergers to the DOJ and FTC, to clarifying the roles of the DOJ, the FTC, state, and federal sectoral regulators, to imposing timetables and deadlines on the merger review process, to nonlegislated convergence strategies.

1. The Advisory Committee believes that the federal antitrust authorities are better positioned to conduct antitrust merger review than federal sectoral regulators. *The majority of Advisory Committee members recommend* removing the competition policy oversight duty from the sectoral regulators and vesting such power exclusively in the federal antitrust agencies. Under such a regime, the findings of the federal antitrust agency on the competition issues would be reported to, and binding upon, the specialized agencies. At this juncture, however, *some members recommend* instead creating a presumption in favor of the analyses undertaken by the federal antitrust enforcement agencies in parallel or subsequent proceedings. Additional approaches advocated in the short run consist of soft convergence strategies between agencies exercising concurrent jurisdiction to encourage the adoption of common analytical methods and enhanced cooperation.
2. With respect to overlapping state review, the Advisory Committee encourages the state attorneys general to resist using antitrust laws to pursue noncompetition objectives. Further,

the Advisory Committee recommends that the federal antitrust enforcement agencies file an *amicus curiae* brief in state courts in select private suits challenging international transactions. For example, appropriate cases may be where the DOJ or FTC has either cleared or settled a transaction where there has been significant cross-border cooperation or the parties agreed to waive confidentiality.

3. All members agree that several issues relating to overlapping agency review deserve further study. These studies should include analyzing the relationship among the DOJ, the FTC, and other federal and state regulators; identifying the differences in review processes with respect to both substantive approaches and procedure; assessing the expertise of the federal antitrust agencies to undertake merger analyses in regulated industries on the one hand and the capacity of federal sectoral and state regulators to conduct antitrust analyses on the other; assessing the ramifications of a change in the status quo; and gathering the views of the reviewing agencies.

<p style="text-align: center;"><b>CHAPTER 4</b> <b>INTERNATIONAL CARTEL ENFORCEMENT AND INTERAGENCY ENFORCEMENT COOPERATION</b></p>
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In the last decade, the U.S. Department of Justice Antitrust Division has aggressively and successfully prosecuted nearly 20 international cartels, filing charges against more than 80 corporate and 60 individual defendants -- both domestic and foreign -- in cases involving price fixing; volume, customer, and market allocation agreements; and bid-rigging -- among other things. These high-visibility prosecutions have involved complex, globally extensive, and sometime long-lived conspiracies and have resulted in the imposition of record-breaking penalties against domestic and foreign defendants alike. Corporate fines in the tens of millions of dollars have become almost commonplace as have significant fines and, increasingly, prison terms for individual defendants.

Several changes in U.S. enforcement efforts have contributed to the detection and successful prosecution of these cartels. In addition to making enforcement efforts against cartels a top priority, the Antitrust Division has instituted a series of incentives for cartel participants to come forward and cooperate with authorities. Moreover, the recent U.S. enforcement successes appear to be occurring amidst a heightened degree of international consensus that cartels should be detected and prosecuted. Some other jurisdictions have followed the U.S. example and are increasing their anticartel enforcement programs, including their focus on international cartels, and their commitment to cooperating more fully with the United States in its anticartel efforts. Yet there is room for even greater international cooperation.



### Improving Knowledge about International Cartels

Whether the surge in U.S. prosecutions means that there are more international cartels in operation than ever before is unclear. What is clear is that international cartels present a serious problem with adverse effects on U.S. and foreign consumers, businesses, and governments. With U.S. anticartel enforcement actions generating considerable interest around the world, the time is opportune for U.S. antitrust agencies not only to expand cooperation with antitrust authorities in other jurisdictions, but also to increase public awareness about the detrimental effects of international cartels.

1. A complete assessment of the incidence of private international cartels is beyond the capabilities of the Advisory Committee. Nonetheless, the Advisory Committee believes that the scope and incidence of international cartels are important matters for further examination and recommends that governments and other experts take up this issue.
2. The Advisory Committee also recommends that the United States expand its efforts to increase public knowledge and awareness at home and abroad of the deleterious effects of cartels for consumers, businesses, and governments.
3. To take advantage of the improved environment for international cooperation on rooting out and prosecuting international cartels, the Advisory Committee hopes that the United States will use all opportunities, both formal and informal, to share its recent experiences with foreign enforcement authorities. Actions to ensure that U.S. anticartel enforcement policies are well understood abroad will enhance the credibility of U.S. enforcement efforts and promote interagency cooperation at the same time.

### Increasing Transparency in Handling Confidential Business Information

The exchange of confidential information between competition authorities is an important feature of deepening cooperation. The United States and international business communities have expressed concerns about agency accountability and transparency in connection with such information exchanges, particularly with respect to cross-border joint investigations into cartel activities (similar concerns in the context of multijurisdictional merger reviews have also been pressed, and they are addressed in Chapter 3). Another recurring concern from some members of the business community and the private bar is that competition authorities do not provide *notice* when they transfer confidential information or other protected information in their agency files to another enforcement agency. In the view of the Advisory Committee:

1. Cooperation between competition authorities should feature appropriate safeguards for confidential information. Competition authorities should ensure the transparency of standards applied in their enforcement efforts. Continuing efforts are necessary to instill

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greater business confidence that exchanges will not result in adverse commercial consequences.

2. U.S. antitrust authorities should consider providing notice -- either before or after the fact -- of their intent to disclose information to antitrust authorities in other jurisdictions unless such notice would violate a treaty obligation of the United States or a court order or jeopardize the integrity of any U.S., state, or foreign investigation.
3. The U.S. antitrust agencies should assess requests from other competition authorities to share confidential information by taking into consideration, among other things, their history of enforcement cooperation with the requesting jurisdiction as well as whether they are confident that the jurisdiction is able to and does protect confidential information under its own laws.

### **The Importance of Positive Incentives**

The United States should attempt to identify positive incentives that can deepen cooperation between U.S. antitrust agencies and competition authorities in other jurisdictions, instill greater public confidence in the value of such cooperation, reduce tensions associated with U.S. enforcement, and further develop a shared culture of sound competition policy around the world. To this end, the Advisory Committee recommends that:

1. The U.S. government should expand its ability to provide technical assistance, both bilaterally and in coordination with international organizations, to develop traditional core areas such as anticartel enforcement activities and premerger reviews as well as new initiatives (such as those discussed in Chapters 5 and 6) to support the operating needs and capabilities of authorities that are beginning to introduce or to enhance competition law and policy regimes.
2. U.S. antitrust authorities are encouraged to expand the jurisdictions with which they have modern antitrust cooperation agreements, including those that feature more detailed provisions regarding positive comity. The U.S. authorities should seek cooperative arrangements with qualified jurisdictions that have newer competition systems as well as with those with more established competition laws.

## **CHAPTER 5 WHERE TRADE AND COMPETITION INTERSECT**

In this chapter, the Advisory Committee considers the intersection of trade and competition policy. Notably, the Advisory Committee focuses on anticompetitive or exclusionary restraints on trade and investment that are implemented by firms, governments, or some combination of the two,

and that hamper the ability of firms to gain access to or compete in a foreign market. Traditionally, such problems have been considered primarily the responsibility of national competition authorities concerned about anticompetitive effects to markets and consumers on their soil. Some countries, notably the United States, have at times applied their law extraterritorially in an attempt to remedy such practices. As formal governmental barriers to international trade and investment are reduced or eliminated, international attention is turning more to anticompetitive practices occurring within nations that affect trade and investment flows from other nations. As a result, perceived restrictions emanating from exclusionary or anticompetitive practices have generated economic and political tensions between nations and firms.

This chapter reviews the landscape of global problems that implicate both international trade concerns about access to markets and competition policy concerns about anticompetitive practices that block the operation of markets. Many international competition problems are not seen by this Advisory Committee as matters of relevance to international trade policy. As discussed in Chapters 2 and 3, the proliferation of merger control regimes is raising transaction costs and introducing new frictions. As discussed in Chapter 4, international cartels appear to be a serious problem for the U.S. and the global economy. These matters are global competition problems but they are not trade and competition policy issues. Yet, there is an important global competition agenda that needs greater attention by the appropriate policymakers at home and abroad. This is considered most directly in Chapter 6.

Chapter 5 considers a variety of acts of governments and firms that can restrict international trade. Around the world, formal governmental actions immunize some firm conduct. Governments also may take measures that are excessively trade-restricting and anticompetitive. Anticompetitive private arrangements also can have adverse effects on international trade and access to markets. And, in some instances such arrangements occur against a background of governmental restraints that are supportive of private restraints. In this way, practices that may be anticompetitive or exclusionary may not fall neatly into a category of either purely private restraints or governmental practices.

Trade and competition policies are two methods of addressing such problems. Trade law and policy are centrally focused on the actions of governments. Competition or antitrust laws are principally focused on firm conduct. In this way, trade and competition policies are designed to look at restraints that come from different sources. As this chapter discusses, aspects of these policies' tools can be mutually supportive. At the same time, overlapping policy concerns can lead to different conclusions regarding the effects of a particular restraint. For example, examination of a vertical distribution practice under U.S. antitrust law might find that the restraint is efficiency-enhancing and beneficial to consumers or merely neutral to consumer welfare, while the same restraint might be seen from a trade policy perspective as exclusionary and adversely affecting access to markets.



## *Executive Summary*

In the absence of a nation's serious commitment to undertake such actions, where legally warranted, the benefits of positive comity may remain modest or illusory. Moreover, to be truly effective, positive comity requires correspondence between the parties' antitrust laws and enforcement commitment. Confidence in positive comity can be weakened if the process is delayed and not transparent. And, of course, it remains a relatively new and untested approach.

Recommendations for addressing concerns about positive comity and improving the process include:

1. The U.S. Department of Justice should build on the U.S.-EC positive comity agreement as a model for future agreements and should continue to expand the jurisdictions with which it enters into bilateral cooperation agreements.
2. It may be possible to improve upon the structure of positive comity provisions still further. The Advisory Committee proposes several specific recommendations to increase communication and transparency in the positive comity process.
3. In addition to visible support for positive comity by competition enforcement agencies, international organizations that address trade and competition issues also should endorse the benefits associated with positive comity in their mission. By advertising the advantages reaped from effective positive comity cooperation, international organizations hold the potential to expand such cooperation to nations or jurisdictions that have similar antitrust laws and enforcement policies.
4. As a means to ensure that aggrieved U.S. firms view positive comity tool as a serious policy option for addressing anticompetitive practices in foreign markets, the Department of Justice should make a conscientious effort to implement and test recent bilateral agreements with positive comity provisions as a first response to solve real problems, when meritorious cases arise.

### **U.S. Enforcement to Gain Market Access**

The record of U.S. government antitrust enforcement actions against foreign restraints that bar access to markets abroad by U.S. firms is limited. The reasons for this are diverse but suggest that significant legal, evidentiary, and other obstacles are likely to make extraterritorial enforcement, particularly with respect to foreign anticompetitive restraints that limit U.S. exports, only infrequently available as a viable policy response. At the same time, unilateral remedies must remain a part of U.S. antitrust policies, particularly when foreign governments are unwilling or unable to undertake their own enforcement actions. U.S. policymakers should make clear that the United States remains committed to using such instruments when necessary and possible.

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1. Although the Advisory Committee believes that it is important for the United States to develop incentives to obtain foreign authorities cooperation, U.S. antitrust laws should not be weakened in an effort to obtain such assistance. For example, the Advisory Committee believes in maintaining treble damage liability in cases where the only antitrust violation alleged is harm to U.S. export commerce.
2. Private and governmental litigation can raise traditional comity concerns on the part of foreign governments. Improvements should be sought in the process and standards by which competing interests are balanced for comity purposes. To that end, the Advisory Committee recommends that federal, state, and local judges hearing private disputes that raise claims or defenses based on considerations of governmental policy invite concerned governments, including the U.S. Department of Justice, to submit their views at an early stage in the litigation. Such “airing of views” commonly takes the form of amicus curiae submissions.
3. The Advisory Committee recognizes that U.S. extraterritorial antitrust enforcement against foreign market-blocking restraints is a sensitive issue for foreign governments that can affect antitrust enforcement cooperation efforts in particular and law enforcement cooperation more broadly. Because of these concerns and the potential obstacles discussed above, the expected results of extraterritorial enforcement against offshore restraints on U.S. exports should not be overestimated. *Indeed, it is for such reasons that the Advisory Committee recommends that a first step in attempting to address these restraints should be to consider whether it is realistic to approach the foreign nation where the practices occur and seek its cooperation.* Where such cooperation is not forthcoming, a willingness to use U.S. antitrust enforcement tools may have the salutary effect of acting as a lever to encourage excluding nations to pursue their own enforcement actions. A tenable U.S. antitrust enforcement effort against market-blocking restraints may contribute to a greater culture of cooperation and enforcement. *It is also essential to the credibility of U.S. antitrust enforcement that the business community have confidence that the Antitrust Division will vigorously pursue cases, including export restraint cases, wherever possible and when no superior alternatives such as positive comity are available.* Further, the Advisory Committee recommends that the U.S. antitrust agencies continue to have responsibility vis-à-vis trade agencies over legal determinations of the anticompetitive conduct of private firms, at home or abroad.
4. One of the most challenging aspects of U.S. enforcement against market-blocking restraints is developing adequate evidence of anticompetitive conduct. In any case that could result in an enforcement action, that information and analysis will be highly fact specific. Nonetheless, considerable disagreement remains about the merits of particular disputes and the extent to which private, governmental, and mixed public-private restraints inhibit trade. It therefore may be useful to undertake some broader empirical analysis such as a study of the magnitude of global trade problems that stem from private or governmental restraints abroad or an analytical effort to evaluate the effects of recent transnational cases such as in the cartel area. Such inquiries would not establish definitive estimates, but could provide a



foundation of evidence or analysis for informed national decisionmaking and international discourse that could be updated, as needed.

### **The Role of International Organizations**

The Advisory Committee believes that in addition to pursuing bilateral cooperation with positive comity, the United States should continue to develop its broader multilateral engagement on competition policy matters. These efforts should encompass a variety of forums and should be aimed at seizing opportunities for developing more seamless markets and expanding meaningful cooperation on practical enforcement problems. The goals for enhanced international engagement should include: (1) developing a more broadly international perspective on competition policy, with the goals of reducing parochial actions by firms and governments; (2) fostering soft harmonization of competition policy systems; (3) developing improved ways of resolving conflicts; and (4) developing a degree of consensus on what constitutes best practices in competition policy and its enforcement.

The World Trade Organization is the multilateral organization most often mentioned in connection with an international effort to develop competition rules. The WTO has a unique place among international organizations and rulemaking bodies by virtue of its inclusiveness (with more than 135 members from developed and developing economies) and its centrality as a forum for negotiating binding rules governing the economic conduct of nations. The WTO's central focus has been on the trade-distorting conduct of governments. With the exception of antidumping and countervailing duty laws, the WTO has not focused on firm conduct. However, while several WTO agreements have elements that implicate competition policy, and while many WTO principles are supportive of competition policy objectives (such as transparency, nondiscrimination, and national treatment), the treatment of competition policy as such in WTO agreements has been only fragmentary.

In thinking about the role that the WTO or another international organization might play with respect to competition policy in the future, the following approaches are *not* endorsed by the Advisory Committee.

- Specifically, this Advisory Committee sees efforts at developing a harmonized and comprehensive multilateral antitrust code administered by a new supranational competition authority or the WTO as both unrealistic and unwise. This is not an argument against efforts at promoting soft convergence; indeed the Advisory Committee advances several proposals that it believes would be useful along those lines. However, deliberations and consultations on substantive as well as procedural features of competition policy regimes are not the same as negotiating a comprehensive international antitrust code.



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- Also unrealistic is the proposition that purely national approaches are sufficient and broader international engagement is unnecessary. This viewpoint ignores both the costs of the current sources of disharmony among nations and equally important, the opportunities that now appear to exist for productive collaboration among competition authorities as well as trade and competition authorities, including at the WTO.

The Advisory Committee believes that attention should be focused on the substantial middle ground between these two extremes. It is here that the WTO can play a constructive role in developing a common understanding of the issues surrounding the intersection of trade and competition policy. However, not all competition problems are trade problems, and hence not all competition problems that are *global* will find a natural home at the WTO.

1. The Advisory Committee therefore recommends that the primary focus of the WTO and its area of core competence remain as an intergovernmental trade forum focusing on governmental restraints. There is a great deal of further liberalization of trade to achieve and that agenda can itself have a positive impact on the environment for competition policy around the world.
2. The Advisory Committee also recommends that the U.S. government support and pursue additional incremental steps at the WTO to deepen the work already under way on the intersection of trade and competition policy. The WTO Working Group on the Interaction Between Trade and Competition Policy is a productive intergovernmental initiative engaging trade and competition officials from both developed and developing economies. To foster the work of this group, the Advisory Committee recommends the WTO undertake these illustrative and largely educative steps to make the WTO a more “competition policy friendly” environment.
  - The most obvious move in this direction would be the continuation of the deliberations of the Working Group, which has had a productive start but is still in the early stages of deliberations.
  - The WTO should increase the competition policy expertise at the WTO Secretariat and in the country missions, wherever possible.
  - The WTO should continue to conduct regular summary reports or review of those countries that have competition laws or policies in place, possibly including such reports in the Trade Policy Review Mechanism (TPRM).
3. At this juncture, the majority of the Advisory Committee believes that the WTO as a forum for review of private restraints is not appropriate. Given the possible risks, and the lack of international consensus on the content or appropriateness of rules or dispute settlement in

this area, this Advisory Committee believes that the WTO should not develop new competition rules under its umbrella. Various concerns animate the Advisory Committee's skepticism toward competition rules at the WTO, including the possible distortion of competition standards through the quid pro quo nature of WTO negotiations; the potential intrusion of WTO dispute settlement panels into domestic regulatory practices; and the inappropriateness of obliging countries to adopt competition laws. While recognizing that in some instances it may not be a fully satisfactory result, the Advisory Committee believes that national authorities are best suited to address anticompetitive practices of private firms that are occurring on their territory.

4. If anticompetitive practices and market-blocking restraints are occurring in a jurisdiction that does not have a competition authority or that authority is unable or unwilling to remedy the problem, then the harmed nation may be able to apply its own laws effectively in an extraterritorial fashion. If relief is not practicable (because of an inability to obtain necessary evidence or other means), then it may be the case that the harmed nation simply has limited relief available to it under the current system. This may appropriately be a subject of international consultation. However, it seems less appropriately a matter for WTO dispute settlement.
5. Over the longer term, the WTO may be called upon to resolve disputes between nations that hinge on whether private practices that foreclose access to markets are ultimately attributable to governmental practices. The ability of the WTO to resolve such disputes is not fully tested under the WTO's existing rules or jurisprudence and is an area that this Advisory Committee believes needs particular study and consideration by trade and competition policymakers in the years ahead. As the world moves into the next century, and as new countries join the WTO, the problems of market access will surely deepen, and the line between public and private restraints will become increasingly opaque. Hence, it is a particularly important area of attention by trade and competition policymakers.

## **CHAPTER 6**

### **PREPARING FOR THE FUTURE**

The Advisory Committee was invited to think broadly and boldly about new tasks and concepts that the United States and the international community should consider in addressing emerging competition issues. This chapter looks at four such areas. First, it examines the possible need for additional multilateral initiatives to deal with competition policy matters that either transcend national boundaries or that would benefit from more international attention. A key recommendation is the proposed "Global Competition Initiative," which is designed to address differences in national approaches to competition that have international consequences. Second, and closely related, the chapter considers the need for an international mechanism that will allow countries to resolve disputes over competition policy. Third, the chapter considers an emerging issue of growing importance, namely, the intersection of competition policy and electronic commerce.

Finally, the chapter considers the configuration of U.S. foreign economic policymaking itself and the role that competition policy perspectives can play in that process.

<b>Global Competition Initiative</b>
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Many competition issues are not trade issues but are nevertheless broadly international. Such issues include harmonization of procedural or substantive features of merger notification and review and protocols to protect confidential information exchanged in the course of enforcement measures, among others. In the Advisory Committee's view, the United States and other nations should continue to use -- but not be limited to -- existing international organizations and venues. Indeed, the Advisory Committee recommends that the United States explore the scope for collaborations among interested governments and international organizations to create a *new* venue where government officials, as well as private firms, nongovernmental organizations (NGOs), and others can exchange ideas and work toward common solutions of competition law and policy problems. The Advisory Committee calls this the "Global Competition Initiative."

1. A Global Competition Initiative should be inclusive and foster dialogue directed toward greater convergence of competition law and analysis, common understandings, and common culture. Such a gathering also could serve as an information center, offer technical expertise to transition economies, and perhaps offer mediation and other dispute resolution capabilities. Areas for constructive dialogue might include further discussions among competition agencies to:
  - Multilateralize and deepen positive comity;
  - Agree upon the consensus disciplines identified in Chapter 2 regarding best practices for merger control laws and develop consensus principles akin to the recent OECD recommendation on hard-core cartels; consider and develop disciplines to define actions of governments; for example in areas with negative spillover potential such as export cartels, which require broader international cooperation and consultation;
  - Consider and review the scope of governmental exemptions and immunities that insulate markets from competition around the world (as discussed in Chapter 5);
  - Consider approaches to multinational merger control that aim to rationalize systems for antitrust merger notification and review (as discussed in Chapter 3);
  - Consider frontier subjects that are quintessentially global such as e-commerce, which will create new challenges for policymakers around the world;



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- Undertake collaborative analysis of issues such as global cartels (discussed in Chapter 4) and market blocking private and government restraints (discussed in Chapter 5); and
  - Possibly undertake some dispute mediation and even technical assistance services.
2. A Global Competition Initiative does not require a new international bureaucracy or substantial funding. The Group of Seven (G-7) summit is an attractive model, in that it demonstrates that countries can create mechanisms to exchange views and attempt to develop consensus on economic issues without an investment in a secretariat or permanent staff. This proposed initiative would benefit from support from international organizations such as the WTO, OECD, the World Bank, and UNCTAD.

### **International Mediation of Competition Disputes**

The Advisory Committee recognizes that existing multilateral organizations are not equipped to handle some competition conflicts between nations. The only options currently available in those conflicts are domestic litigation against a sovereign state, brinkmanship, or diplomatic negotiation. Consequently, some consideration and experimentation with approaches is needed to provide alternative options for resolving these conflicts. One possible approach is to create a mediation mechanism in which neutral but expert parties can help the parties reach a settlement and where no party to a dispute enjoys any home-court advantage.

1. The Advisory Committee recommends that the U.S. government and other interested governments and international organizations consider developing a new mediation mechanism as well as some general principles to govern how international disputes, at least sovereign competition policy disputes, might be evaluated under such a mechanism. This mechanism could be developed under the auspices of the proposed Global Competition Initiative or elsewhere.
2. The members of the mediation panel would be drawn from a roster of internationally respected antitrust and competition experts. An examination of a competition policy conflict by an expert panel will face many challenges. However, in some circumstances it could prove useful to clarify the competition policy characteristics of the problem at hand.

### **Electronic Commerce and Competition Policy**

In thinking about the global challenges to competition policy in the next century, the Advisory Committee identified e-commerce and the application of competition policy to high technology industries as important frontier issues. Accordingly, in Chapter 6 the Report considers some of the competition policy dimensions raised by e-commerce.

### **The Role of the Department of Justice in U.S. Foreign Economic Policy**

For a variety of reasons, the Antitrust Division of the Department of Justice has not traditionally played a central role in deliberations on U.S. foreign economic policy nor seen its role as broadly international in nature. Globalization is changing this reality if not the existing structures. The Report considers whether and how the role of the Antitrust Division should be included in U.S. Government discussions concerning foreign economic policy.

1. The Advisory Committee believes that the law enforcement dimensions of antitrust must remain outside of the deliberative interagency process. Some members are concerned that the participation of antitrust officials in senior interagency deliberations broader than antitrust enforcement runs the risk of politicizing antitrust decisionmaking; others are more of the view that it is important to have such participation in all domestic and foreign policy deliberations that implicate competition policy.
2. One potentially constructive step would be to ensure that the Antitrust Division, working in close consultation with the Federal Trade Commission, is the lead negotiator on any international discussions on competition policy, be they multilateral, bilateral, or regional. This approach has parallels in other international negotiations, such as those involving financial services and securities.

### **Expanding U.S. Technical Assistance in Competition Law and Policy**

The Advisory Committee has considered additional affirmative steps the United States might undertake to expand technical assistance to overseas competition agencies. Technical assistance programs may provide the United States with a voice to support the adoption of sound competition principles and promote the rule of law, especially by transition economies. Further, in light of the proliferation of new antitrust authorities, technical assistance can be used to convey practical experience and advice to emerging antitrust regimes, as well as guidance on the formulation of domestic competition policies that make sense in the globalized economy. U.S. support of new competition policy regimes also creates an opportunity for the United States to share its perspective. This can be important as a means of influencing the legal environment in which U.S. exporters and businesses operate.

U.S. government support for technical assistance programs to support competition policy regimes around the world has been a small but important component of its enforcement cooperation work over the past decade. U.S. antitrust authorities have provided technical assistance under programs characterized by modest funding, geographical limitations, and varying duration or scope. The Advisory Committee advocates application of a broader view of U.S. priorities in this regard, and recommends the following:

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1. The United States and indeed the world community should devote more technical assistance to the development of competition policy structures abroad.
2. Support to transition and developing antitrust regimes should be included among U.S. funding priorities, and the U.S. government should more vigorously support a variety of ways of offering such support.
3. The United States should create and seek opportunities for deepening consultation and cooperation with other countries and organizations providing technical assistance, including those major jurisdictions that are engaged in providing structured technical assistance, and multilateral or international organizations such as the OECD, the World Bank, the International Monetary Fund, and the WTO.



# Chapter 1

## GLOBALIZATION AND ITS IMPLICATIONS FOR ANTITRUST COOPERATION AND ENFORCEMENT

In the last several decades, more and more nations have come to recognize the value of competition as a tool for spurring innovation, economic growth, and the economic well-being of countries around the world. National industrial policies and other government interventions that constrain or order competition within markets have not wholly disappeared but are far less evident than they were even a decade ago.

This new era is being defined by economic liberalization around the world and by dynamic technological change that not only is made possible by liberalization, but is itself an engine for liberalization. Both of these phenomena -- economic liberalization and technological development -- are in turn driving economic integration. This changing environment has many positive aspects. It promises more wealth for the world, including the less developed world, and more economic opportunity based on merit. But the changes can also be threatening and frightening.

Competition policy can help to facilitate economic liberalization. If working properly, competition policy can produce more goods and services from scarce resources and provide a set of rules and disciplines that are not based on privilege and that are conducive to and responsive to efficient marketplace behavior. A century ago, only the United States had comprehensive antitrust laws in place. With the reconstruction following World War II, a number of jurisdictions in Western Europe, as well as Japan and some Latin American regimes developed competition or antitrust laws in some form. Today, more than 80 countries have antitrust laws, approximately 60 percent of which were introduced in the 1990s.<sup>1</sup>

Most nations have enacted competition laws as a way to actualize (as well as to symbolize) a degree of commitment to the competitive process and to the prevention of abusive business practices. The European Union (EU) has used competition policy as an instrument to foster economic integration. The introduction of competition laws and policies has also gone hand in hand with economic deregulation, regulatory reform, and the end of command and control economies.

Yet, the emergence of competition policy regimes has not meant a uniformity of substantive rules or institutional approaches around the world. Competition policies of nations differ within a

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<sup>1</sup> Another 20 or more countries are in the process of drafting laws. Moreover, those countries with competition laws accounted for nearly 80 percent of world output and 86 percent of world trade. See Mark R.A. Palim, *The Worldwide Growth of Competition Law: an Empirical Analysis*, XLIII ANTITRUST BULL. 105, 109.

range that is in keeping with differences in legal systems. Moreover, even within established antitrust jurisdictions such as the United States, antitrust law evolves and changes. Technological development, the drive for competitiveness in the world environment, and economic analysis all contribute to changes in competition policy.

### **THE MANDATE OF THE INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE**

What new tools, tasks, and concepts will be needed to address the competition issues that are just emerging on the horizon of the global economy? To answer this question and to guide policymaking in the medium term, Attorney General Janet Reno and Assistant Attorney General for Antitrust Joel I. Klein, in November 1997, formed the International Competition Policy Advisory Committee (the "Advisory Committee" or "ICPAC") -- the first such body formed by the U.S. Department of Justice on international antitrust matters. The Advisory Committee was asked to give particular attention to three topics: multijurisdictional merger review; future directions in enforcement cooperation between U.S. antitrust authorities and their counterparts around the world, particularly in their anticartel prosecution efforts; and the interface of trade and competition issues. The reasons for these points of focus are clear. The large number of mergers being reviewed by a multitude of competition authorities, the significant increase in the number of international cartel cases being prosecuted by the Antitrust Division, and the international controversy over barriers to market access stemming from allegedly anticompetitive private barriers to trade have come to make these international matters of mainstream significance to U.S. antitrust policy.

Over the course of two years, the Advisory Committee held extensive public hearings in Washington with the participation of scholars, business executives, economists, lawyers, and competition officials from around the world.<sup>2</sup> Additionally, the Advisory Committee undertook an extensive outreach effort, received numerous submissions, and actively debated not only the three key topics identified above but additional matters that the Advisory Committee considered likely to be important to international antitrust in the next century.<sup>3</sup> At the same time, some issues were consciously excluded from the Advisory Committee's work. For example, the Advisory Committee did not review unfair domestic trade remedies, such as antidumping measures. In addition, the Advisory Committee did not address a variety of practices that may be reprehensible, illegal, or offensive under U.S. or foreign law or policy that can affect the nature of competition within a market or internationally. These include matters such as substandard wage and employment standards, the use of child labor, and lax environmental regulations, among others.

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<sup>2</sup> See Annex 1-B.

<sup>3</sup> The transcripts of Advisory Committee meetings and hearings, outreach questionnaires, and request for papers are all available at the Advisory Committee's website at <<http://www.usdoj.gov/atr/icpac/icpac.htm>>.



The Advisory Committee has tried to identify initiatives that the U.S. Department of Justice and the U.S. government could undertake over the short and medium term and that would contribute to achieving the integration of markets through:

- *Increased transparency and accountability of government actions*, including those of the U.S. government as well as other jurisdictions, and a more nearly shared view by such authorities of what constitutes best practices in the field of competition policy and its enforcement;
- *Expanded and deeper cooperation* between U.S. and overseas competition enforcement authorities, and between trade authorities and competition enforcement authorities, to ensure that domestic and international structures are in place for deepening international approaches to shared problems and managing tensions that might arise; and
- *Greater soft harmonization and convergence of systems* with the aims of limiting actions by governments and firms that stifle competition and produce negative spillover effects abroad, reducing unnecessary transaction costs for firms, and increasing efficiency of effort and outcome for governments and consumers.

These approaches are explained and amplified in the chapters that follow.

For Members and staff of the Advisory Committee, an exciting aspect of the study has been the opportunity to enrich perspectives about the consequences of economic globalization for competition policy in the years ahead. We first share below our assessment of the challenges posed for international antitrust policies by the international economy.<sup>4</sup>

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<sup>4</sup> There is no single or even established methodology for evaluating the importance of the international economy and international competition problems on the U.S. or other national economies. As a general matter, neither the Antitrust Division of the U.S. Department of Justice nor the U.S. Federal Trade Commission even routinely keep data on the basis of domestic versus international matters. This overall lack of data reflects, in part, what can be the absence of a unique or defining character of a transaction that is international. It also reflects the U.S. government's longstanding policy that U.S. antitrust authorities "do not discriminate in the enforcement of the antitrust laws on the basis of the nationality of the parties. Nor do [they] employ their statutory authority to further non-antitrust goals." U.S. DEPARTMENT OF JUSTICE/FEDERAL TRADE COMMISSION, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS 2 (1995) *reprinted in* 4 TRADE REG. REP. (CCH) ¶13,107 (1995). That policy of neutrality and nondiscrimination is a critical and admirable feature of the U.S. system. The sparsity of data collected to illustrate the extent to which the U.S. antitrust agenda is now "international" is a problem that should be amenable to correction without harming those critical principles. The Antitrust Division recently began tracking the number of transactions it reviews with "an international aspect," as discussed further in Chapter 2. The U.S. Federal Trade Commission maintains statistics on the number of Hart-Scott-Rodino filings received from foreign parties. *See* Annex 2-B. Similarly, the Antitrust Division's Executive Office developed a definition for identifying "international matters" that it has used since 1997 for data collection of criminal antitrust matters, among others, associated with Antitrust Division performance measurements, as described further in Chapter 4.



## **THE GLOBAL ECONOMY AND COMPETITION POLICY**

In considering competition policy and the international marketplace, a key challenge stems from the disjunction between national laws and international markets. In other words, law is national but markets can extend beyond national boundaries. This obliges us to ask: If markets are broader than national boundaries, are national laws and their enforcement sufficient to deal with the market problems of the new century? To avoid the difficulties that would inevitably attend the development of any supranational law (such as a new international bureaucracy, loss of democratic participation, or loss of local choice), is it possible to rely upon national law, yet at the same time work toward the development of a more seamless international system that facilitates the workings of global markets? The United States and indeed the international community are well on the way to solving some of the challenges raised by this central problem, but less advanced in addressing others. Let us consider both dimensions.

Of all these challenges, the international community has made the most headway in increasing cooperation and networking among the competition agencies of the world. International cartel enforcement and other forms of international enforcement cooperation in merger review are notable areas of success, particularly in recent years. These cooperative efforts are a welcome change from the early years of the postwar period, when U.S. attempts to apply its antitrust laws to address offshore practices seen as harming the U.S. economy led to instances of sharp conflict with other sovereigns. Today, there is far less conflict between jurisdictions, and in the last decade there have been few, if any, instances of countries invoking statutes such as blocking and clawback laws to impede the United States in its efforts to prosecute transnational antitrust cases.

Furthermore, both the number of bilateral antitrust cooperation agreements between the United States and other jurisdictions and the number of new international initiatives have increased markedly in recent years. Bilateral antitrust cooperation agreements are instruments that the United States and other jurisdictions use to expand ties with one another and to improve opportunities for cooperation and coordination in antitrust enforcement matters. Formal and informal bilateral arrangements have helped to introduce, deepen, and regularize the structure of the enforcement cooperation that now occurs, while the contents of the agreements have gone through several generations.<sup>5</sup> The United States is currently a party to bilateral antitrust cooperation arrangements with seven jurisdictions: Australia, Brazil, Canada, the European Union, Germany, Israel, and Japan. It is also a party to several multilateral arrangements made under the auspices of the Organization for Economic Cooperation and Development (OECD) and the North American Free Trade Agreement. Each bilateral agreement reflects two themes -- enforcement cooperation, on the one hand, and the avoidance or management of disputes, on the other. In 1999 the United States entered into its first bilateral antitrust agreement designed specifically to permit the exchange of confidential

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<sup>5</sup> Annex 1-C hereto describes the international antitrust cooperation agreements to which the United States is a party as well as those regional initiatives where it has been an active participant.

information: an agreement with Australia negotiated in keeping with the International Antitrust Enforcement Assistance Act of 1994.

An important milestone in international cooperation was the 1998 supplement to an earlier U.S. agreement with the European Commission, which enhances the provisions governing positive comity. As discussed in some detail in Chapter 5, positive comity presents a means whereby the jurisdiction most closely associated with the alleged anticompetitive conduct assumes primary responsibility for the investigation and possible remedy. Positive comity holds the potential to obviate the need for extraterritorial enforcement if the requested party can resolve or remedy the anticompetitive activities.

These cooperative solutions hold great potential, but, of course, it is predictably the case that they work effectively only when the cooperating agencies are jointly sympathetic to an approach regarding the particular enforcement matter. When interests or perspectives diverge, cooperation is less useful.

A second challenge is now being observed: laws of some 60 nations, and the number is growing, require (or provide for) antitrust merger notification, waiting periods, substantive review, and formal clearance of a transaction. The growing tendency of nations to apply their laws to offshore mergers and the sheer volume of law that now must be considered by firms undertaking mergers are not necessarily positive developments. Questions arise whether the overlapping regulations are excessive, and whether the system can be usefully rationalized yet still ensure that enforcers have the tools necessary to identify and remedy anticompetitive transactions.

A third challenge is linked to the world trading system itself and the promise of open markets: Nations may promise open markets as far as the state is concerned and undertake substantial liberalization commitments with respect to governmental practices, but at the same time allow, by action or inaction, blockage of their markets by firms' anticompetitive restraints. If there is an international interest in removing those restraints and thus freeing up the world markets, can this interest be fully satisfied by national antitrust law? Is a new approach needed that does not split the state role from the private role and that does not test the limits of national jurisdiction?

Sound competition policy recognizes that markets without artificial borders introduced by governments and without distortions caused by anticompetitive business arrangements benefit from the application of principles such as national treatment, nondiscrimination, and transparency. These are, of course, among the core rules of the World Trade Organization (WTO) and its predecessor, the General Agreement on Tariffs and Trade (GATT). In part, for this reason, the issue of competition policy and its relationship to trade and potential for treatment under international trade rules has become a subject of intensive consideration at the WTO and elsewhere.

There are still other challenges. How can nationalistic incentives and action, such as national champion or beggar-thy-neighbor policies, be limited? Can the costs of divergent sets of laws be



eliminated without undermining national choices made in particularized contexts? Would rules or understandings that tend to limit and channel antitrust disputes be worthwhile? What assistance can help developing countries to strengthen their markets and participate more fully in the world trading system by anchoring their markets with competition laws appropriate to their systems, and will that thereby help improve the world competition system?

The Advisory Committee's mandate specifically includes the first three problems, which are addressed in Chapters 2 to 5. Moreover, this Advisory Committee has interpreted its mandate to include the panoply of issues that are world competition issues. Indeed, the Advisory Committee was asked to think broadly and boldly about what new tools, tasks, and concepts will be needed to address emerging international competition issues. Thus, this Report considers problems that transcend nations, problems within individual nations, and problems between particular systems.

The diversity of approaches to competition policy combined with a growing recognition of the positive role for competition suggest to this Advisory Committee that there is value in seeking a degree of harmonization of systems. This Report discusses the potential for such soft convergence efforts in a variety of forums and identifies some specific steps to further that objective. This effort will require even greater engagement by U.S. officials in discussion and cooperation with their counterparts. The Advisory Committee views such activities as an important and necessary addition to the traditional enforcement activities undertaken by U.S. antitrust agencies.

The Advisory Committee has considered the role for competition policy in the global economy broadly and with a view to improving approaches not only within the United States but also around the world. It is not possible to predict how the global economy will evolve, but this Report starts from the premise that the United States should try to provide an environment conducive to the further expansion of international commerce, tolerant of the diversity of nations with respect to their own evolving law, and hospitable to the enhancement of world welfare.

## **STRUCTURE OF THE REPORT**

Turning now to the specific discussions that follow, this Report begins with a review of the problems and challenges resulting from the growth of merger control laws around the world. Chapter 2 considers the scope for substantive harmonization between systems and outlines several specific steps that U.S. authorities might take over the medium term to forge even closer ties with other authorities around the world, improve transparency and manage frictions. This chapter also considers steps likely to promote a degree of convergence among nations.

Chapter 3 considers policy approaches that could be undertaken within the United States and between jurisdictions to reduce transaction costs that may arise when mergers are reviewed in multiple jurisdictions. This chapter identifies several due process and procedural principles designed to ensure that merger control efforts focus on those transactions that raise competition concerns within a reviewing jurisdiction and refrain from unduly burdening transactions, particularly those



that lack anticompetitive potential. The discussion does not, however, advocate any single approach for all systems.

In Chapter 4 the Report examines international anticartel enforcement and the role of cross-border enforcement cooperation in that process. The number of U.S. antitrust cases filed against international cartels has increased dramatically in recent years, and those cases show that international cartels impose serious costs on the U.S. economy as well as on economies around the world. Most, if not all, jurisdictions with competition laws in place prohibit cartels. And most of the U.S. bilateral antitrust cooperation agreements are designed to facilitate cooperation in enforcement actions against cartels. This chapter examines the recent U.S. record of enforcement action against international cartels and considers what additional steps might be undertaken to increase business awareness of the problem and to enhance cooperation between competition authorities still further.

In Chapter 5 the Report considers areas where trade and competition policy concerns can intersect, most notably with respect to anticompetitive practices in foreign markets that are seen as inhibiting export commerce or blocking access to those markets. This is a subject that has animated trade tensions between nations, triggering intensive discussion at a variety of international forums, most recently at the November 1999 WTO talks in Seattle. This chapter examines the policy options available to the United States and other nations to address problems that are perceived to arise from some combination of private and governmental restraints on trade. It considers the scope for expanding bilateral cooperation, including the use of positive comity; the utility of U.S. extraterritorial enforcement actions; and the potential for international initiatives on market access problems that might be taken at the WTO, the OECD, and other international forums. While the WTO clearly has an important role to play, the Advisory Committee sees the global competition policy agenda as a broad one, the full range of which does not find its natural home at the WTO.

In Chapter 6 this Report considers the global competition problems that require expanded international initiatives by the United States and other nations. New initiatives, supported by existing institutions, may be in order. Hence, this last chapter considers steps that the United States could undertake domestically to ensure that its institutional structures and approaches to the making of foreign economic policy are configured to respond to the challenges of the global economy. The chapter also considers an expanded set of policy initiatives that the United States could usefully undertake multilaterally. This discussion recognizes that the global economy is also creating new challenges to competition policy at home and abroad and that it is therefore necessary to consider the applicability of competition law and policy to emerging or evolving fields such as electronic commerce. Through an examination of U.S. policy from these different perspectives, the Report aims to ensure that the United States continues to lead by example and to engage constructively with competition policy regimes around the world.<sup>6</sup>

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<sup>6</sup> A Separate Statement by Advisory Committee Member Eleanor M. Fox can be found at Annex 1-A.



## *Chapter 2*

### **MULTIJURISDICTIONAL MERGERS: FACILITATING SUBSTANTIVE CONVERGENCE AND MINIMIZING CONFLICT**

Issues raised by the proliferation of merger control laws are at the cutting edge of economic globalization. The marked increase in the number of jurisdictions that have adopted merger review regimes makes it increasingly likely that international mergers and acquisitions will be reviewed by multiple competition authorities. The substantive standards contained in the competition laws and regulations of nations differ, reflecting divergent policy goals. Such differences, especially when coupled with the significant extraterritorial reach of many merger control laws, present challenges both for the merging parties and for reviewing antitrust authorities.

For the merging parties, these challenges may include heightened uncertainty regarding the ultimate legality of the proposed transaction; the necessity for interacting and negotiating with multiple reviewing authorities; the possibility of inconsistent and perhaps conflicting rulings; and the potential for overly burdensome remedies. These challenges increase transaction costs for merging parties and, in the worst-case scenario, may result in the abandonment of procompetitive transactions.

The challenges that antitrust authorities confront in the multijurisdictional merger review arena are equally significant. Antitrust enforcers are reviewing transactions where more and more firm assets and production facilities, as well as documents and witnesses, may be located outside the borders of the reviewing jurisdictions. As a result, an antitrust authority might create international friction by imposing remedies with extraterritorial effects, or the remedies imposed by one reviewing jurisdiction might prevent another jurisdiction from obtaining the relief it seeks. Further, merger reviews frequently require antitrust enforcers to cooperate to obtain information and arrive at consistent outcomes and compatible remedies around the world. When divergence occurs, it is the agencies that must often explain and at times attempt to reconcile their differences. Clashes also may lead to trade wars.

Although much attention has been focused on the potential for divergent outcomes when proposed transactions are reviewed by multiple agencies, multijurisdictional merger review for the most part has resulted in consistent outcomes and compatible remedies. The possibility of divergent outcomes will remain, however, as long as underlying substantive differences in merger control laws exist and multiple agencies continue to review a single transaction.



The Advisory Committee is of the view that these challenges may best be addressed by facilitating, where possible, substantive harmonization and convergence of substantive standards and approaches to merger review. Complete harmonization and convergence will be achieved only in the long run, if ever. This, however, should not deter policymakers and their publics from taking steps where possible to support and facilitate efforts at harmonization and convergence both in the short and medium term. To this end, the Advisory Committee considers herein a variety of steps to achieve this goal.<sup>1</sup> The unifying theme of these recommendations is that cooperation among antitrust enforcement authorities is not only desirable but necessary if the challenges in this arena are to be addressed effectively.

The Advisory Committee further believes that if undertaken, the proposed reforms also may have the beneficial effect of reducing the incidence of nationalistic actions by competition authorities around the world. For example, transactions reviewed in one jurisdiction may have the potential to generate net positive effects in that country and net negative spillovers elsewhere. It is customary practice and therefore to be expected in the short and medium term that enforcement authorities will focus primarily on the effects that each transaction will generate within their own jurisdiction. Over time, as the level of harmonization and convergence increases, however, the Advisory Committee considers that there may be circumstances when it may be appropriate (or necessary) for enforcement authorities to cooperate in accounting for the global effects of a proposed transaction.

The United States by virtue of its extensive history of cooperation can and should continue to forge even closer ties with other competition authorities around the world. Indeed, perhaps one of the most important ways the United States can stimulate global convergences lies in refining and expanding its network of international cooperation agreements, and this chapter offers a perspective on how such cooperation might deepen over time.

More specifically, this chapter examines the challenges presented by multijurisdictional merger review and identifies concrete ways in which the United States and other jurisdictions may begin to address these challenges constructively. This chapter first explores in greater detail the trends that collectively have generated the challenges that corporations and antitrust authorities frequently encounter in the multijurisdictional merger arena. It also explores the underlying substantive differences among antitrust merger control laws and the implications of these differences for multijurisdictional merger review. The chapter then considers steps likely to minimize conflicts and to promote a degree of convergence among nations. These include facilitating greater transparency, developing disciplines for the review of transactions with significant transnational or

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<sup>1</sup> The Advisory Committee uses the word harmonization to signify a process that relieves tensions between and among the laws and policies of different nations by bringing the laws and policies into a state of greater compatibility. Harmonization can be achieved in many ways. This report advocates soft harmonization (that is, not mandatory) and recommends steps that jurisdictions can take to facilitate the adoption and implementation of common goals. Thus, when this Report recommends harmonization, the Advisory Committee is recommending measures designed to bring law and procedures into closer identity, i.e., convergence.

spillover effects, enhancing cross-border cooperation through the development of a framework for cooperation and the exchange of confidential business information, and developing work-sharing arrangements.

In Chapter 3 the Advisory Committee examines those problematic features within merger review systems that increase uncertainty about individual transactions and give rise to unnecessary transaction costs through the notification and review procedures implemented by various jurisdictions. As described in detail there, the Advisory Committee believes that these costs can most profitably be addressed by advocating targeted reform in individual merger regimes through the promotion of best practices. Broadly speaking, these best practices seek to ensure that each jurisdiction's merger review regime examines only those mergers that have a nexus to and the potential to create appreciable anticompetitive effects within that jurisdiction, and to further ensure that each jurisdiction refrains from imposing unnecessary burdens on those transactions during the course of the merger review process.

## **INTERNATIONALIZATION OF ANTITRUST MERGER CONTROL LAW**

Since World War II significant effort has been spent on developing and implementing international trade agreements designed to lower governmentally imposed barriers to trade and investment. These efforts along with the unilateral actions of governments to open their markets have produced many areas of success. During this same period, transportation costs have decreased significantly, and technological developments have made possible the nearly instantaneous sharing of information and data throughout the world. Together, these developments have facilitated the flow of goods and services among nations, thereby increasing the linkages among national economies.

### **Globalization and the Merger Wave**

As barriers to trade and investment have been reduced, companies have responded by expanding their business operations into other countries. One of the preferred mechanisms for international expansion has been through mergers, acquisitions, and joint ventures.<sup>2</sup> Although many factors have been identified as drivers of merger activity, perhaps one of the most important is the ease with which mergers enable companies to expand into new geographic markets.<sup>3</sup> As one

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<sup>2</sup> See Submission by Michael H. Byowitz and Ilene Knable Gotts, Wachtell, Lipton, Rosen & Katz, "Rationalizing International Pre-Merger Review," ICPAC Hearings (Nov. 4, 1998), at 2-3 [hereinafter Byowitz and Gotts Submission]. Cross-border deals accounted for a quarter of the mergers in 1998. Securities Data Company.

<sup>3</sup> Significant effort has been expended to identify the driving forces behind mergers and acquisitions. In 1959, for example, the National Bureau of Economic Research released a study on U.S. merger movements from 1895 through 1956. This study concluded that the primary drivers of merger activity are two related factors: a strong capital market and a strong economy. Interestingly, the study concluded that technological innovation was not a primary factor in the merger waves that occurred during the period under examination. Expert testimony at ICPAC hearings indicates that the primary forces that motivate mergers remain the same today. "Simply put, while there will be mergers even in bad



economist testified at ICPAC hearings, “[c]omplementary geographic coverage can be very important, especially in international mergers. It can be less expensive to expand into a new market by simply buying someone who is there, someone who knows what’s going on on the ground rather than having to do those investments yourself.”<sup>4</sup>

Moreover, as national markets evolve into a global marketplace, more and more companies are deciding that they must become bigger to compete effectively. The Antitrust Division observed that “[o]ne way companies are growing, be they large vertical or horizontal conglomerates, or small single-industry businesses, is through strategic mergers. Companies of all stripes are seeking to grow and enhance owner or shareholder value through combination with other concerns where there is some relationship between or among the goods and/or services created.”<sup>5</sup>

The United States is currently in the midst of the fifth merger wave that has occurred during the last 100 years.<sup>6</sup> In 1999 global merger and acquisition activity was at an all-time high, with over \$3.4 trillion in mergers announced worldwide. This volume renders small by comparison the

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times, especially where economic pressure forces people to sell, by and large merger waves are associated with periods when financial markets and the economy are booming.” Submission by Ali E. Wambold, Managing Director, Lazard Frères & Co., LLC, ICPAC Hearings (Nov. 3, 1998), at 2-3 [hereinafter Wambold Submission]. Another expert testifying at ICPAC hearings suggested that the overall business and economic drivers of merger activity can be divided into three broad categories: macroeconomic factors in the environment, the condition of financial markets, and sectoral changes occurring in particular industry areas. Testimony of Steven B. Wolitzer, Managing Director, Lehman Brothers, ICPAC Hearings (Nov. 3, 1998), Hearings Transcript, at 7-8.

<sup>4</sup> Testimony of Dr. James A. Langenfeld, Principal, Law and Economics Consulting Group, ICPAC Hearings (Nov. 3, 1998), Hearings Transcript, at 27. Similarly, in rapidly evolving technology markets where timeliness is critical, firms may purchase product markets to enhance or leapfrog into the next generation products.

<sup>5</sup> Department of Justice, Antitrust Division, FY2000 Congressional Budget Submission, at 18, 26; *see also* Transcript of Testimony of Senator Orrin Hatch at the Senate Judiciary Committee Hearing on the effects of corporate mergers and consolidations (June 16, 1998) (observing that many of the recent mergers are undertaken in response to the strategic imperatives of the globalized economy in an effort to increase market share). An interim report by a White House group looking at the recent merger wave found that the current wave of mergers has not produced an unhealthy concentration of power (the report was not made public). The White House merger working group recommends no major changes in antitrust law. Ronald G. Shafer, *Washington Wire*, WALL ST. J., May 21, 1999, at A1. The FTC also held hearings on October 12 and December 13, 1995, to identify and examine the need for changes in antitrust to deal with global competition and high technology and innovation. According to the FTC Staff Report, the hearings confirmed that the core aspects of antitrust law continue to serve the United States well, and that vigorous competition in domestic markets aids success in today’s global marketplace. A REPORT BY FEDERAL TRADE COMMISSION STAFF, ANTICIPATING THE 21ST CENTURY: COMPETITION POLICY IN THE NEW HIGH-TECH, GLOBAL MARKETPLACE (May 1996).

<sup>6</sup> The first merger wave during this period occurred during the 1890s, another in the 1920s, a third in the 1960s, and a fourth during the early and mid-1980s. *See* DEVRA L. GOLBE AND LAWRENCE J. WHITE, *Catch A Wave: The Time Series Behavior of Mergers*, in *THE REVIEW OF ECONOMICS AND STATISTICS* 493 (1993).



previous year, itself a record year with approximately \$2.5 trillion in merger activity.<sup>7</sup> The increase in merger activity also is reflected in the total value for domestic mergers. In the United States, approximately \$1.7 trillion worth of U.S. deals were announced in 1999, a slight increase from the \$1.6 trillion announced the year before. As the total value of transactions grew in the United States, however, the number of deals actually declined to 10,892 compared with 12,279 in 1998. By contrast, the value of European transactions announced in 1999 more than doubled that of the prior year to \$1.2 trillion spread over 12,062 transactions.<sup>8</sup> This merger wave has encompassed virtually every industry from financial services, to telecommunications, to defense.<sup>9</sup>

As the number of total mergers has increased, so too has the number of antitrust notifications filed with the U.S. antitrust authorities under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act or HSR) which established a premerger notification and review system in the United States.<sup>10</sup> In the early 1990s, fewer than 2,000 transactions were notified to the U.S. antitrust authorities each year. During fiscal year 1999 the U.S. antitrust authorities received notifications for 4,679 transactions (Annex 2-A).<sup>11</sup>

The number of mergers reviewed in the United States with international implications likewise has increased significantly during the last few years. Robert Pitofsky, Chairman of the Federal Trade Commission (FTC), recently noted that when he served on the Commission during the Carter administration in the late 1970s, it reviewed only one transaction with an international dimension.<sup>12</sup> By contrast, from 1987 to 1997, merger filings in the United States involving a foreign acquiring person or foreign acquired entity ranged from 15.5 percent to 51 percent a year, and requests for

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<sup>7</sup> Judy Radler Cohen, *Blockbusters, Nonstop! Global M&A hits \$3.4 trillion as Europe takes off and telecom soars*, INVESTMENT DEALER'S DIGEST, Jan. 17, 2000 citing Thomson Financial Securities Data.

<sup>8</sup> *Id.* Some question whether the current surge in merger activity will continue and suggest a downturn may already have begun. Wambold Submission, at 4-5 (observing that even if the U.S. economy retreats, merger activity in Europe may remain relatively strong in the short term).

<sup>9</sup> Notable deals announced in 1999 include Olivetti SpA/Telecom Italia SpA (\$35 billion); Vodafone Airtouch plc/Mannesmann AG (\$140 billion); Sprint Corp./MCI Worldcom Inc. (\$114 billion). Judy Radler Cohen, *Blockbusters, Nonstop! Global M&A hits \$3.4 trillion as Europe takes off and telecom soars*, INVESTMENT DEALER'S DIGEST, Jan. 17, 2000. In 1998, notable deals included Travelers Group/Citicorp (\$73 billion); Norwest/Wells Fargo (\$34 billion); NationsBank/BankAmerica (\$62 billion); WorldCom/MCI (\$44 billion); SBC Communications/Ameritech (\$63 billion); and Lockheed-Martin/Northrop Grumman (\$11.6 billion). Department of Justice, Antitrust Division, FY2000 Congressional Budget Submission, at 7, 18.

<sup>10</sup> 15 U.S.C. §18a.

<sup>11</sup> U.S. DOJ Premerger Office; FTC and DOJ Annual Report to Congress Fiscal Year 1998, Exhibit A. Fiscal year 1999 filings reflect a slight decrease from fiscal year 1998 when 4,728 transactions were notified.

<sup>12</sup> Mergers and Acquisitions: ABA Section Examines Consequences of Proliferation of Premerger Notification, 75 Antitrust & Trade Reg. Rep. (BNA) 163 (Aug. 6, 1998)(reporting Chairman Pitofsky's remarks at the American Bar Association's Section of Antitrust Law annual meeting).

additional information and documentary material (colloquially referred to as a second request) issued by either the Department of Justice, Antitrust Division (DOJ) or the FTC ranged from 13 percent to 46 percent.<sup>13</sup> Although in 1999 the total number of transactions notified to the U.S. antitrust authorities declined slightly from the prior year, notified transactions involving a foreign acquiring person or foreign acquired entity increased. During fiscal year 1999, 849, or roughly one-fifth of the notifications that the U.S. antitrust authorities received under the HSR Act involved a foreign acquiring person or foreign acquired entity (compared with 736 the prior year). Preliminary investigations were opened in 111 matters resulting in 21 second requests and ultimately five enforcement actions (Annex 2-B).<sup>14</sup>

The DOJ recently began tracking the number of investigations of transactions with an international aspect, a broader measure than merely examining whether a foreign acquiring person or foreign acquired entity is involved in a transaction. A transaction is considered to have an international aspect if it may involve possible adverse impact on U.S. domestic or foreign competition *and* if it meets at least one of the following criteria:

- one or more involved parties is not a U.S. citizen or U.S. business;
- one or more involved parties is not located in the United States;
- potentially relevant information is located outside the United States;
- conduct potentially illegal under U.S. law occurred outside the United States; or
- substantive foreign government consultation or coordination is undertaken in connection with the matter.<sup>15</sup>

In recent years, transactions with an international aspect have made up a nontrivial percentage of all transactions in which the U.S. antitrust authorities have issued second requests. Of the 68 second requests issued by the DOJ in 1999, 18 involved transactions with international aspects.<sup>16</sup> During the first nine months of fiscal year 1999, the FTC issued 38 second requests of

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<sup>13</sup> Robert Pitofsky, Chairman, U.S. Federal Trade Commission, The Effect of Global Trade on United States Competition Law and Enforcement Policies, Remarks before Fordham Corporate Law Institute 26<sup>th</sup> Annual Conference on International Antitrust Law & Policy, at 4 (Oct. 15, 1999). Second requests are issued when the agencies choose to conduct a full investigation of a transaction's likely effect on competition.

<sup>14</sup> U.S. DOJ Premerger Office; Letter from William J. Baer, Director, Bureau of Competition, U.S. Federal Trade Commission, to James F. Rill, Esq. and Dr. Paula Stern (June 15, 1999) (providing statistics for fiscal years 1996-1998) [hereinafter Baer June 15, 1999 Letter]. The term "enforcement action" includes matters in which the FTC or DOJ issued a proposed consent order, authorized a preliminary injunction or administrative complaint, and matters in which the parties addressed concerns raised by the agencies by using a "fix-it-first" solution or by abandoning the transaction.

<sup>15</sup> Department of Justice, Antitrust Division, FY2000 Congressional Budget Submission, at 72.

<sup>16</sup> U.S. DOJ Premerger Office.



which 21 involved formal notifications to foreign governments. Twelve of these second request investigations involved substantial discussions with foreign antitrust authorities.<sup>17</sup>

Cases involving an international aspect also account for a significant percentage of enforcement actions against proposed mergers undertaken by the U.S. antitrust authorities. Of the 46 enforcement actions taken by the DOJ in fiscal year 1999, 3 involved transactions with international aspects.<sup>18</sup> At the FTC, 13 of the 28 merger enforcement actions undertaken in fiscal year 1998 involved notifications to foreign governments, and of those, 6 involved substantial discussions with foreign authorities also reviewing the transaction. In addition, the FTC reports that there have been about a dozen other mergers in which discussions took place between FTC staff and reviewing enforcement authorities in other countries but for which the FTC concluded that no enforcement action was necessary.<sup>19</sup>

One could take an even broader view of internationalization. These numbers may underestimate the percentage of transactions that possess international implications, however, because they may not capture transactions involving U.S. firms with foreign sales or assets or purely domestic transactions that involve global markets. In 1999, for example, Chairman Pitofsky estimated that approximately 50 percent of the mergers investigated by the FTC at any given time have an impact on consumers in more than one country and “often require a remedy, or a series of remedies that are coordinated among law enforcement authorities in different countries.”<sup>20</sup> Similarly, Assistant Attorney General Joel Klein of the Justice Department’s Antitrust Division indicated in November 1998 that the percentage of *all* matters reviewed by the Antitrust Division and possessing

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<sup>17</sup> Richard G. Parker, then-Senior Deputy Director, Bureau of Competition, U.S. Federal Trade Commission, Global Merger Enforcement, Remarks before the International Bar Association (Sept. 28, 1999) [hereinafter Parker Remarks (Sept. 28, 1999)]. The cooperation agreements to which the United States is a party generally require each party to notify the other whenever its competition authorities are engaged in enforcement activities which may affect “important interests of the other party.” In 1998, the DOJ and FTC notified the EC of 39 mergers under the 1991 U.S.-EC Cooperation Agreement. The EC notified the U.S. agencies of 43. Commission Report to the Council and the European Parliament on the Application of the Agreement between the European Communities and the Government of the United States of America Regarding the Application of their Competition Laws, Jan. 1, 1998 to Dec. 31, 1998 (Apr. 2, 1999).

<sup>18</sup> U.S. DOJ Premerger Office.

<sup>19</sup> Parker Remarks (Sept. 28, 1999).

<sup>20</sup> Robert Pitofsky, Chairman, U.S. Federal Trade Commission, Remarks at the Brussels Press Conference following the U.S.-EC annual bilateral talks (Oct. 6, 1999); *see also* Robert Pitofsky, Chairman, U.S. Federal Trade Commission, Federal Trade Commission Merger and Competition Policy—The Way Ahead, Remarks before the American Bar Association Annual Meeting (Aug. 4, 1998) (remarking that half of all mergers reviewed at the FTC at any given time involve a foreign party, information located outside the United States, or a foreign asset that is critical to a remedy).



an international aspect had grown from 2 to 3 percent in the early 1990s to almost 40 percent in 1998.<sup>21</sup>

## **Overview of Substantive Approaches to Merger Analysis**

These trends render it increasingly likely that mergers involving firms doing business in several jurisdictions will be reviewed by multiple antitrust authorities. Of the more than 80 jurisdictions currently possessing competition laws, it is estimated that at least 60 provide for merger control (Annex 2-C). This number undoubtedly will increase as other countries implement competition laws.

Jurisdictions with antitrust merger control laws employ differing substantive standards of review. The merger laws of nations essentially span the following spectrum: laws that prohibit or control anticompetitive mergers; laws that prohibit or control mergers that create or enhance dominance; and laws that prohibit or control either anticompetitive mergers or those that create or enhance dominance unless the economic advantages of the merger to the country -- including preservation of jobs and promotion of exports -- outweigh the disadvantages.

In many merger cases the differences in substantive law are not apparent because the result of the analysis is the same. Nonetheless, the following differences are noteworthy. First, as with all of competition law, views diverge about the meaning of anticompetitive and dominance. In a number of countries, very strong presumptions arise from high market shares. For example, in the European Union (EU), 50 percent and sometimes 40 percent of a market means dominance, especially if the next largest company is far behind.<sup>22</sup> The United States, on the other hand, measures market power and its possible increase microeconomically, by considering the various relevant factors in the specific context. In many, if not most of the less mature competition systems, harm to competition is presumed if the merging companies are competitors and have significant market shares, and the burden shifts to the merging parties to show that the economic advantages to the nation outweigh the harm.

The definition of anticompetitive has another dimension. Many jurisdictions consider a merger anticompetitive if it significantly lessens the market opportunities of the remaining firms in the market. To the extent that consumer interests are a major concern, it is usually assumed that a merger that blocks meritorious competition by less powerful firms will harm the consumers by depriving them of options and eventually of the fruits of robust competition. This view of competition has led the European Commission (EC) to be concerned about portfolio effects, whereby

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<sup>21</sup> Testimony of Joel I. Klein, Assistant Attorney General, U.S. Department of Justice, Antitrust Division, ICPAC Hearings (Nov. 2, 1998), Hearings Transcript, at 13.

<sup>22</sup> Under EU law, for example, when Boeing increased its market share from 64 percent to 70 percent by acquiring McDonnell Douglas, Boeing reasonably could be viewed as dominant and having increased its dominance. Boeing/McDonnell Douglas, EC Case No. IV/M.877, ¶ 29 (July 30, 1997).

the merged firm would have a full product line, buyers would find doing business with the full line firm irresistible, and these purchasers would shift share to the dominant firm, increasing its dominance.<sup>23</sup>

In some countries this has led to a competitor-driven merger review process. U.S. antitrust practitioners are accustomed to U.S. authorities having a healthy skepticism of the views of direct competitors, which may be motivated by obvious strategic incentives. In the United States, particularly careful attention is paid to the views of customers, who serve as the primary proxy for a transaction's effect on consumers. Merger review in the EU under the EC Merger Regulation permits third parties to submit written or oral comments if they so request and can show a "sufficient interest" in the outcome of the proposed transaction.<sup>24</sup> The EC considers competitors, customers, and suppliers to be sufficiently interested parties in virtually all circumstances.<sup>25</sup> According to recent analysis, competitors have been much more aggressive than customers and suppliers in attacking transactions under the EC Merger Regulation. In practice, the transactions involving the most voluminous records also involve the most intense competitor attacks. Some argue that this phenomenon raises public policy questions regarding the proper role of competitors as intervenors in the merger control process.<sup>26</sup>

The law of some other countries is even more concerned about the impact of a transaction on small- and medium-sized businesses and gives the competition authorities power to block mergers because of their damaging effect on these firms. For example, the law of South Africa does so explicitly;<sup>27</sup> other laws do so implicitly. Globalization has a disciplining effect on such uses of the law. Almost every country has been captivated by the ambition for competitiveness, which means that the antitrust agencies have an incentive to approve efficient mergers and not to handicap the nation's firms.

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<sup>23</sup> The EC applied the portfolio effects theory in two aircraft mergers, *De Havilland* and *Boeing*, noting that the merged firm in each case would have a full family of aircraft. *Boeing/McDonnell Douglas*, EC Case No. IV/M.877, ¶38 (July 30, 1997); *Aérospatiale-Alenia/De Havilland*, EC Case No. IV/M.053 (Oct. 2, 1991).

<sup>24</sup> Council Regulation (EEC) No. 4064/89, O.J. L 395/1 (Dec. 30, 1989), as amended [hereinafter EC Merger Regulation].

<sup>25</sup> See BARRY E. HAWK AND HENRY L. HUSER, *EUROPEAN COMMUNITY MERGER CONTROL: A PRACTITIONER'S GUIDE* 309-10 (Kluwer Law Int'l 1996)[hereinafter HAWK AND HUSER]. The Commission defines an "interested" third party as one that has expressed comments following publication of the initial Official Journal notice announcing the parties' notification of the proposed concentration and "those which the Commission believes are liable to be affected" by its decision (e.g., a clearance subject to remedial commitments by the parties or modifications to their proposed concentration). See European Commission Twenty-Fourth Report on Competition Policy 1994, at ¶315.

<sup>26</sup> HAWK AND HUSER, at 309-310; Testimony of Barry Hawk, Skadden, Arps, Slate, Meagher & Flom, ICPAC Hearings (Nov. 3, 1998), Hearings Transcript, at 106-107.

<sup>27</sup> Competition Act of 1998 (as amended 1999) ch. 3 §16(3).



A conclusion that a merger is anticompetitive or dominant assumes a definition of the market. The U.S. antitrust enforcement agencies have a very specific blueprint for defining the market, as laid out in the DOJ and FTC Horizontal Merger Guidelines.<sup>28</sup> The EC has adopted a notice on market definition that in many ways is very similar to the market definition section of the U.S. merger guidelines.<sup>29</sup>

Immature market systems are often so lacking in resources that the agencies cannot conduct sophisticated economic analysis, much less gather the basic background facts necessary for them to do so. Often, in these jurisdictions, any distinct product overlap and overlapping geographic area will be accepted as the market.

Another area of difference is the extent to which national industrial policy is a defense to an anticompetitive merger. For example, some jurisdictions use their merger regimes to preserve employment, promote exports, or place domestic firms at a competitive advantage in the international arena. In these jurisdictions, there is the risk that a government could use its antitrust review process to delay or complicate clearance of a small but important piece of a large, multinational transaction to serve a nonantitrust agenda. As one commentator observed, such an agenda could include parochial commitments to keep a local plant open, to hire more local personnel in key positions, or to resolve some other political (but nonantitrust) problem.<sup>30</sup> In several nations such considerations are aboveboard, but for other nations the use of national industrial policy as a trump over competition concerns may not be transparent. Instead, it may be obscured under the gauzy cloak of an opinion that finds that the transaction does not have an anticompetitive effect.

Despite differences, however, there also are significant commonalities, and further convergence on substantive standards is occurring. Recent examples of convergence may be attributable to the diffusion of information, which in turn may be attributable to cooperation among antitrust authorities in different jurisdictions. One government official has stated:

[T]here are fewer differences about what is sound competition policy and about how to assess any particular merger than would appear if you were to ask the agencies to

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<sup>28</sup> U.S. Dep't of Justice and Federal Trade Commission, Horizontal Merger Guidelines (April 2, 1992), *as amended* April 8, 1997, *reprinted at* 4 Trade Reg. Rep. (CCH) ¶13,104. Though even application of the Guidelines can lead to widely differing results, as seen in the FTC challenges of Staples/Office Depot and Tenet Healthcare/Poplar Bluff Physicians Group Hospitals. *FTC v. Staples*, 970 F. Supp. 1066 (D.D.C. 1997); *FTC v. Tenet Health Care Corp.*, 17 F. Supp. 2d 1045 (E.D. Mo. 1998), *rev'd*, 186 F.3d 1045 (8<sup>th</sup> Cir. 1999).

<sup>29</sup> Commission Notice on the definition of the relevant market for purposes of community competition law, O.J. C 372 (Dec. 9, 1997).

<sup>30</sup> James B. Kobak, Jr., and Anthony M. D'Iorio, Hughes Hubbard & Reed LLP, *The High Cost of Cross-Border Merger Reviews*, in *THE GLOBAL ECONOMY AT THE TURN OF THE CENTURY*, VOL. III INTERNATIONAL TRADE, at 717, 721 (Gulser Meric and Susan E.W. Nichols eds., 1998) submitted by Mr. Kobak for inclusion in the Advisory Committee record [hereinafter Kobak Submission].



negotiate a common code or even a common premerger notification form. When you put the questions in the abstract, you isolate differences in national style and perhaps differences in substantive policies. But when you get down to the concrete, and ask what's really the problem with a particular merger and how do we solve it, my impression is that, in the day to day work of the agencies, there is a high degree of good will and procedural cooperation . . . and that that good will and cooperation leads to a kind of substantive agreement at least with respect to the application of competition principles to the particular case at hand. There is therefore reason to believe that more and more cooperation on specific cases will lead to some kind of de facto convergence among the different competition authorities.<sup>31</sup>

Perhaps the most notable steps toward convergence have occurred between the United States and the EU, presumably because of the high level of interaction and cooperation between the two jurisdictions following the implementation of a bilateral agreement regarding the application of their competition laws (1991 U.S.-EC Agreement). At ICPAC hearings, officials from the EC noted that with the exception of the Boeing/McDonnell Douglas case, virtually all other cases had come up with consistent results.<sup>32</sup>

Another notable example of convergence includes the EC's recent adoption of aspects of market definition analysis historically employed by the U.S. agencies. The U.S. authorities also have placed a greater emphasis on unilateral effects analysis (similar to the EU's historical emphasis on single-firm dominance), whereas, in the EU, the Courts and Commission have recently applied collective dominance to merger analysis, a shift toward a greater focus on the likelihood of coordinated effects postmerger (similar to the U.S. agencies' historical emphasis on the ability of the remaining firms either tacitly or expressly to collude post-merger).<sup>33</sup>

There also appears to be movement away from using antitrust laws to pursue noncompetition objectives. For example, the United Kingdom has proposed replacing its general public interest test for mergers with a competition-based test and creating an independent competition authority as the decisionmaker. The UK has published *Mergers: A Consultation Document on Proposals for Reform* to encourage public debate on these issues.<sup>34</sup>

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<sup>31</sup> Remarks by A. Douglas Melamed, Principal Deputy Assistant Attorney General, U.S. Dep't of Justice, Antitrust Division, ICPAC Committee Meeting (Sept. 11, 1998), Meeting Minutes, at 106.

<sup>32</sup> Testimony of Karel Van Miert, then-Competition Commissioner, European Commission, ICPAC Hearings (Nov. 2, 1998), Hearings Transcript, at 51 [hereinafter Van Miert ICPAC November Hearings Testimony].

<sup>33</sup> Testimony of William J. Kolasky, Jr., Wilmer, Cutler & Pickering, ICPAC Hearings (Nov. 3, 1998), Hearings Transcript, at 129-133 (highlighting areas of EU-U.S. convergence on substantive standards and notable exceptions, including treatment of efficiencies and remedies) [hereinafter Kolasky ICPAC November Hearings Testimony].

<sup>34</sup> *Mergers - A Consultation Document on Proposals For Reform*, Department of Trade and Industry Publication 4308 at <<http://www2.dti.gov.uk/CACP/cp/mergercon.htm>>.

## **Challenges Presented by Diverse Policy Goals and Approaches**

Diverse policy goals and approaches to merger review present the potential for divergence in analyses and results and may give rise to international friction.

### *Potential for Divergence in Analyses and Results*

Respondents to ICPAC outreach efforts have indicated that divergent results in multijurisdictional merger review most commonly arise when only one of several reviewing jurisdictions challenges a transaction or when a remedy imposed by one authority is more demanding than the remedies imposed by other reviewing jurisdictions.<sup>35</sup> In such cases, the most restrictive nation prevails.

Different outcomes, however, are not necessarily inconsistent. Frequently differences are premised upon differing factual situations among the reviewing jurisdictions.<sup>36</sup> For example, a transaction may implicate separate markets in various jurisdictions. It is to be expected that each jurisdiction will seek the remedy necessary to prevent anticompetitive effects in its markets. Even where the markets involved are international in scope, applicable law or the effectiveness of a remedy may vary from one jurisdiction to another. Each jurisdiction's law demands that it obtain the relief necessary to correct anticompetitive problems arising in that jurisdiction and under its law. In such cases, authorities who have chosen to take no action or to impose a "lesser" remedy against a proposed transaction generally do not feel aggrieved by actions taken in other jurisdictions. Indeed, there are very few situations in which agencies or merging parties have complained about inconsistent results.<sup>37</sup>

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<sup>35</sup> See, e.g., Submission by American Bar Association Section of Antitrust Law, "Report on Multijurisdictional Merger Review Issues," ICPAC Hearings (May 17, 1999), at 27 [hereinafter ABA Antitrust Section Multijurisdictional Merger Review Submission]; Upjohn Co./Pharmacia, 60 Fed. Reg. 56,153 (1995), *order entered* 61 Fed. Reg. 31,120 (1996); EC Case No IV/M.631 (Sept. 28, 1995); Hoechst AG/Marion Merrell Dow, 60 Fed. Reg. 49,609 (1995), *order entered* 61 Fed. Reg. 16,794 (1996); EC Case No IV/M.587 (June 22, 1995); Baxter Int'l Inc./Immuno, FTC Dkt. No. C-3726, *reported at* 5 Trade Reg. Rep. (CCH) ¶ 24,184 (Mar. 24, 1997); EC Case No IV/M.821 (Oct. 9, 1996) (in these three cases, the United States ordered divestiture of U.S. or worldwide assets and/or imposed licensing requirements whereas the EC cleared the transactions).

<sup>36</sup> As Debra Valentine, General Counsel, U.S. Federal Trade Commission, remarked, sometimes two or more antitrust authorities looking at the same transaction will (and should) come to different results because the transaction will in fact have differing impacts on different markets. Debra A. Valentine, *Building A Cooperative Framework For Oversight in Mergers -- The Answer to Extraterritorial Issues in Merger Review*, 6 GEO. MASON L. REV. 525, at 527-28 (1998) [hereinafter Valentine, George Mason Remarks]; see also Kolasky ICPAC November Hearings Testimony, at 157.

<sup>37</sup> See ABA Antitrust Section Multijurisdictional Merger Review Submission, at 27; Panel on Conflicts and Remedies, ICPAC Hearings (Nov. 3, 1998), Hearings Transcript, at 123-173.



Divergent results may present a conflict, however, when a party is unable to comply with the remedies imposed by two different jurisdictions.<sup>38</sup> Such outcomes rarely, if ever, occur. Close cooperation may be credited with achieving compatible results in many cases reviewed in the United States and by the EC. Government officials have observed that “even if the transaction needs to be addressed somewhat differently on both sides of the Atlantic because of differing market conditions and competitive realities, we reach solutions involving divestitures and licensing that neither conflict nor force firms to choose between complying with U.S. or EC law.”<sup>39</sup>

It has been emphasized, however, that it is not necessary for remedies imposed by various jurisdictions to conflict for them to burden a transaction unduly. The cumulative effect of remedies imposed by several jurisdictions ultimately may outweigh the benefits the merging parties had hoped to attain, thereby forcing the parties to abandon the proposed transaction.<sup>40</sup> When a transaction has a significant anticompetitive effect on the local economy in any given jurisdiction, the local antitrust authority has a legitimate interest in reviewing the transaction and imposing a remedy. However, while any one remedy could make sense from the point of view of any particular jurisdiction, taken together, remedies from several jurisdictions may lead to what is perceived as overregulation or inefficiency. As two experts have noted:

Large international mergers tend to be time sensitive and vulnerable to regulatory uncertainty. As a result, merging parties are reluctant to litigate, even when faced with onerous demands from antitrust enforcement agencies. Any agency of significance may therefore have the leverage to obtain remedies which have international spillover effects. Merging parties may find that they are forced to divest of businesses or license intellectual property in countries where the merger has been cleared or where no competition concerns exist.<sup>41</sup>

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<sup>38</sup> From the agencies’ perspective, a conflict also may arise when remedies imposed by one jurisdiction impact the remedies available to another jurisdiction. This is particularly problematic in largely global transactions where the impact of various remedies may differ from jurisdiction to jurisdiction.

<sup>39</sup> See Valentine, George Mason Remarks, at 531.

<sup>40</sup> See, e.g., Comments of American Airlines, Inc., by Greg A. Sivinski, Senior Attorney, American Airlines, at 5 (March 15, 1999), submitted for inclusion in the Advisory Committee record.

<sup>41</sup> A. Neil Campbell and Jeffrey P. Roode, McMillan Binch, “International Mergers: The Highest Common Denominator Effect of Cross-Border Divestitures and Licensing Remedies,” *Global Competition Review*, Aug./Sept. 1997, submitted by Mr. Campbell for inclusion in the Advisory Committee record; see also Testimony of Ilene Knable Gotts, Wachtell, Lipton, Rosen & Katz, ICPAC Hearings (Nov. 3, 1998), Hearings Transcript, at 142 (cautioning that the premerger review process should not be used as a way to address non-merger-related issues or to achieve noncompetition-law objectives: “You have these two companies that want to proceed to that finish line as quickly as possible. That doesn’t mean that that’s an opportunity to extract a toll from these companies.” Gotts explains that from the parties’ perspective, the fix may be so small compared to the value of an entire transaction, the parties may concede, even though it is not the merger that will have the impact or even when an agency may be seeking to extract a remedy



### *Friction Among Jurisdictions*

Multijurisdictional review of mergers can precipitate international friction among nations in at least two circumstances. First, friction may arise among jurisdictions as a result of externalities (that is, competitive benefits or harm in foreign markets) that are not considered by one or more reviewing authorities. For example, a jurisdiction may clear a transaction that may increase prices in a nonreviewing jurisdiction. Conversely, a jurisdiction that blocks a transaction may also block benefits that would arise in another jurisdiction. This type of situation may occur when an international merger review is based on policies unrelated to competition. For example, a merger may be challenged on competition grounds in one or more countries and at the same time be favored in another country because of its positive impact on employment or investment and growth in the domestic economy. Friction also could occur, however, when a transaction is reviewed in both jurisdictions on competition grounds, when one nation's decision that a merger is anticompetitive and should be enjoined clashes with another nation's decision that a merger is procompetitive and should be allowed.

The second source of potential friction arises when remedies with extraterritorial effects are imposed. With increased globalization, more and more firm assets and production facilities may be located wholly outside the borders of the reviewing jurisdictions. This market development raises potential frictions when remedies are imposed in another country that may have concluded a remedy is not necessary. Most multinational mergers and joint ventures that the United States reviews involve a U.S. and a foreign firm, or, if both firms are foreign firms, at least one has production facilities in the United States. The same holds true for the EC.<sup>42</sup> However, the United States occasionally has reviewed and taken enforcement action against a merger of foreign firms, neither of which had production assets in the United States. In addition, the United States has ordered divestiture of foreign assets.<sup>43</sup> The EC also has ordered undertakings when the merging firms' only assets or only productive assets were outside of the EU.<sup>44</sup>

In 1990 the FTC provoked a dispute with Canada in the *Institut Merieux* case, when, without first consulting with Canadian authorities, it imposed a remedy on the proposed merger of a French

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beyond what is needed. For example, an authority may seek to improve the market from the status quo. Gotts concludes that there are other avenues to address those concerns.)

<sup>42</sup> Valentine, George Mason Remarks, at 525-26.

<sup>43</sup> In re *Institut Merieux*, 113 F.T.C. 742 (1990) (In 1990, the FTC obtained a consent agreement imposing divestiture although neither party maintained production facilities in the relevant market -- rabies vaccine -- in the United States); see also *United States v. Baker Hughes Inc.*, 1990-2 Trade Cas. ¶ 69,149 (D.D.C. 1990) (consent decree ordering divestiture of U.S. and foreign assets).

<sup>44</sup> See, e.g. *Boeing/McDonnell Douglas*, EC Case No. IV/M.877 (July 30, 1997); *Gencor/Lonrho*, EC Case No. IV/M.619 (Apr. 24, 1996); Case T-102/96, *Gencor v. Commission* [1999] ECR 0000, [1999] 4 CMLR 971; *Anglo American Corp./Lonrho*, EC Case No. IV/M.754 (Apr. 23, 1997).

firm and a Canadian firm with no production assets in the United States.<sup>45</sup> Today, such consultation would occur as a matter of course, before accepting such a settlement, with the FTC or DOJ seeking the parties' permission to share confidential business information to the extent necessary for such consultation. For example, in 1994, in a case closely coordinated between the FTC and the German Federal Cartel Office, the FTC reached a consent agreement with Oerlikon-Bührle, a Swiss firm that proposed to acquire Leybold, a German company. The FTC concluded that the merger would reduce competition in the U.S. markets for turbomolecular pumps used in manufacturing semiconductors and in the world market for compact disc metallizer machines. Both companies sold substantial amounts of their production in the United States, even though both companies' production facilities were in Europe. The FTC required divestitures in both lines of business.<sup>46</sup>

Boeing's acquisition of McDonnell Douglas is a prominent example of how divergent assessments can create friction. The *Boeing/McDonnell Douglas* case might have been just another of the growing number of cases in which two sets of antitrust authorities vet a merger, one clears it, while the other has concerns and negotiates relief. But, in the Boeing case, according to one Advisory Committee member, "this dull tale was not to be."<sup>47</sup> The United States viewed the transaction as competitively benign and did not challenge the transaction, but the EC challenged the transaction and permitted its consummation only with remedial measures.<sup>48</sup> Many Europeans viewed the lack of an FTC challenge as inexplicable, given that agency's aggressive enforcement posture in many other merger cases. The EC's high-profile decision to challenge the transaction was attacked by some in the United States as reflecting an industrial policy favoring a "national champion" rather than the principled application of EU competition law principles.<sup>49</sup>

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<sup>45</sup> 113 F.T.C. 742 (1990).

<sup>46</sup> *In re Oerlikon-Bührle Holding AG*, FTC Dkt No. C-3555 (Feb. 1, 1995), reported at 5 Trade Reg. Rep. (CCH) ¶ 23,697.

<sup>47</sup> Eleanor M. Fox, *Lessons From Boeing: A Modest Proposal To Keep Politics Out of Antitrust*, Antitrust Report, at 19, Nov. 1997 [hereinafter Fox, *Lessons from Boeing*].

<sup>48</sup> The facts of Boeing's acquisition of McDonnell Douglas are well known: Both Boeing and McDonnell Douglas do business in a global market. Both have their productive assets in the United States. They have no productive assets in Europe. Airbus, the European rival to Boeing, is a European consortium and has received subsidies from three European governments. See *Boeing/McDonnell Douglas*, EC Case No. IV/M.877 (July 30, 1997); The Boeing Co., et al., Joint Statement closing investigation of the proposed merger and separate statement of Commissioner Mary L. Azcuenaga, FTC File No. 971-0051 (July 1, 1997), reported at 5 Trade Reg. Rep. (CCH) ¶24,295.

<sup>49</sup> ABA Antitrust Section Multijurisdictional Merger Review Submission, at 27. Boeing found the merger review process in Europe "involved a high level of controversy relating to trade policy, perceived affects on Airbus and various other policy issues, which Boeing viewed as largely unrelated to antitrust considerations." Submission by Theodore J. Collins, Senior Vice President & General Counsel, The Boeing Company, in response to Advisory Committee Multijurisdictional Merger Review Case Study questionnaire re the Boeing/McDonnell Douglas transaction, at 3 (March 19, 1999)[hereinafter Collins Submission].



Many Americans perceived the EC to be primarily, if not solely, concerned with the effect of the merger on Boeing's principal competitor, Airbus Industrie, and largely uninterested in the views of customers or consumers. Airbus's role in the EC review was prominent. The company was a full participant in the EC hearings, was allowed to question Boeing witnesses, and was permitted to review Boeing's proposed remedial obligations before the EC accepted them. Counsel for Boeing characterized the remedies imposed by the EC as unusual by standards of U.S. merger theory in that many of the remedies did not relate to effects of the combination of Boeing and McDonnell Douglas, but instead appeared to be intended solely to provide benefits to Airbus.<sup>50</sup>

Other observers believe, however, that the EC could credibly find the merger anticompetitive by neutral application of its law. Indeed, EC law pointed to illegality. At least some friction arising from this merger may have resulted from the failure of some in the United States to recognize or accept EC merger law.<sup>51</sup>

The review process also seemed highly political and very public. American politicians -- all the way up to the President of the United States, who telephoned the President of the European Commission in Luxembourg -- "waged a war to save Boeing/McDonnell Douglas from the Europeans."<sup>52</sup> From the time the merger was announced, and long before Boeing made a European filing or provided factual information to the EC authorities, the Commissioner for Competition announced that the merger would not be approved without substantial concessions, which were outlined in press releases, interviews, and speeches. The Commissioner gave speeches in the United States condemning the transaction before review of the merger had been completed. There also was public speculation that the merger would not be approved without abrogation or renegotiation of the bilateral treaty on large aircraft subsidies.<sup>53</sup>

High-profile cases such as *Boeing/McDonnell Douglas* notwithstanding, consistent outcomes and compatible remedies are more the rule than the exception. The possibility of divergent outcomes will remain, however, as long as underlying substantive differences in merger control law exist and proposed transactions continue to be reviewed by multiple agencies.<sup>54</sup>

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<sup>50</sup> Benjamin S. Sharp and Thomas L. Boeder, Perkins Coie LLP, antitrust counsel for Boeing, in response to Advisory Committee Multijurisdictional Merger Review Case Study questionnaire re the Boeing/McDonnell Douglas transaction, at 4,7,8 (March 30, 1999)[hereinafter Sharp and Boeder Submission].

<sup>51</sup> See e.g., Fox, *Lessons from Boeing*.

<sup>52</sup> *Id.*

<sup>53</sup> Sharp and Boeder Submission, at 7.

<sup>54</sup> J. William Rowley, QC and A. Neil Campbell, McMillan Binch, *Multi-jurisdictional Merger Review -- Is It Time for A Common Form Filing Treaty?* in POLICY DIRECTIONS FOR GLOBAL MERGER REVIEW; A SPECIAL REPORT BY THE GLOBAL FORUM FOR COMPETITION AND TRADE POLICY, at 23 (1999), submitted by the authors for inclusion in the Advisory Committee record [hereinafter Rowley and Campbell Submission].



## STRATEGIES FOR FACILITATING SUBSTANTIVE CONVERGENCE AND MINIMIZING CONFLICT

The first category of reform efforts proposed by the Advisory Committee addresses the potential in the multijurisdictional review context for conflicting outcomes and inconsistent or overly burdensome remedies. These challenges can best be addressed by facilitating, where possible, substantive harmonization and convergence in merger review. Perhaps the most ambitious vision that some experts have advanced is the goal of replacing domestic merger review systems with a uniform and binding world antitrust code for premerger review, to be administered by an international merger review agency or through an international dispute resolution system. The ICPAC hearings testimony and other outreach efforts, however, recognize (as have commentators and prior studies) that agreement on specific substantive rules is unlikely in the foreseeable future.<sup>55</sup> The development of a substantive code, for example, has been criticized as unworkable or overly ambitious at this juncture, in large part because of the difficulties of reconciling the numerous substantive and procedural variations of disparate merger review systems.<sup>56</sup>

The same concerns militate against development of dispute resolution mechanisms. Some members of the business community and their antitrust counsel would welcome an international dispute resolution process that would mediate differences between the major antitrust enforcement agencies with the goal of reaching a common or compatible result.<sup>57</sup> The same considerations that work against a world antitrust code strongly suggest, however, that it is likewise questionable whether a formal dispute settlement process is a realistic option. Indeed, differing substantive legal standards and underlying merger policies, national sovereignty issues, and enforcement mechanisms would all present seemingly insuperable obstacles to any supranational arbitration process, even

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<sup>55</sup> Prof. Richard Whish and Prof. Diane Wood, *MERGER CASES IN THE REAL WORLD: A STUDY OF MERGER CONTROL PROCEDURES*, at 115, prepared for the OECD Committee on Competition Law and Policy (1994); American Bar Association Antitrust Section, *REPORT OF THE SPECIAL COMMITTEE ON INTERNATIONAL ANTITRUST* (1991), at 289-292 [hereinafter ABA ANTITRUST SECTION 1991 SPECIAL COMMITTEE REPORT]; *see also, e.g.*, Byowitz and Gotts Submission, at 12-13.

<sup>56</sup> Rowley and Campbell Submission, at 11; *see also* ABA Antitrust Section Multijurisdictional Merger Review Submission, at 2-3, which concurs, noting that many countries currently do not have antitrust laws, or have only weak antitrust laws, so an attempt at substantive convergence may result in the adoption of very weak rules (e.g., the “lowest common denominator”). Further, if common rules were adopted, it would be much more difficult to modify or update those rules on a multilateral basis than it would be for each country to change its own laws based on changing circumstances. Finally, differences in the legal cultures of nations also constitute obstacles to merger control convergence.

<sup>57</sup> Submission by Michael Sennett, Bell, Boyd & Lloyd, in response to Advisory Committee Multijurisdictional Merger Review Case Study questionnaire re the Baxter International Inc./Immuno International AG transaction (April 9, 1999). Mr. Sennett suggests that the process place emphasis on the competition views of the jurisdiction with the most significant contact with the transaction and interest in the resolution of the antitrust issues.

assuming that a consensus could ever be achieved as to the identity or composition of such a body.<sup>58</sup> And, as a practical matter, resort to international mediation to resolve disputes in any specific case seems unrealistic given the time-sensitive nature of merger transactions.

One respondent to ICPAC's request for input summarized these points well:

Proliferation around the world of merger notification regimes, particularly those requiring government clearance before a transaction may close, are clearly adding costs to global business. In time these may prove to be real impediments to procompetitive business arrangements. At least at the present time, however, even where jurisdictions may take a different position with respect to the merits of a transaction or a remedy, [we] do not see any usefulness in setting up a dispute resolution mechanism at the international level. Such a mechanism might well lengthen an already over-long process, and further complicate business transactions that are generally procompetitive. Much can be accomplished by individual jurisdictions improving their own techniques for investigation and their own forms for reporting of a proposed transaction.<sup>59</sup>

The Advisory Committee agrees that seeking a binding world antitrust code and dispute resolution system is neither achievable nor advisable. This Report considers the potential for developing a mediation mechanism as well as some general principles that might govern how international disputes might be evaluated under such a mechanism in Chapter 6. The Advisory Committee believes that, in the short to medium term, facilitating cooperation among antitrust enforcement authorities may ameliorate, at least to some extent, the potential for conflicting outcomes and inconsistent or overly burdensome remedies. Indeed, this cooperative process helps ensure in most cases that the authorities will arrive at complementary conclusions, while permitting the authorities to take into account circumstances that are unique to their own countries. Further, frequent contact among national antitrust authorities and discussion of antitrust concepts in various multilateral forums have already prompted some convergence of international antitrust laws.

Nations can take steps to facilitate, where possible, the harmonization and convergence process and further minimize transaction costs and conflicts in at least three concrete areas.

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<sup>58</sup> Boeing would have seriously considered any alternative dispute resolution mechanism that offered the likelihood of prompt clearance. However, Boeing acknowledges that it is difficult to envision a mechanism acceptable to the United States and Europe that would have accomplished this result with respect to the Boeing/McDonnell Douglas transaction. Collins Submission; *see also* Submission by Dr. W. Kissling, President, Oerlikon-Bührle, in response to Advisory Committee Multijurisdictional Merger Review Case Study questionnaire re the Oerlikon-Bührle/Leybold transaction (March 17, 1999).

<sup>59</sup> Submission by Lester L. Coleman, Executive Vice President and General Counsel, Halliburton Company, in response to Advisory Committee Multijurisdictional Merger Review Merger Case Study questionnaire re the Halliburton/Dresser transaction, at 4 (March 9, 1999).



- A first step in facilitating greater substantive convergence lies in understanding more clearly the merger review principles currently employed by various jurisdictions.
- Effort also should be expended by nations on developing agreed-upon approaches of what the Advisory Committee is calling “disciplines” that nations would use to guide the review of mergers with significant transnational or spillover effects.
- To further facilitate substantive convergence and avoid or minimize divergent outcomes, it is important to encourage continued and deepened cooperation among antitrust authorities in reviewing multijurisdictional mergers. Creation of a framework to guide the cooperative process would foster this mutually beneficial cooperation between companies and competition authorities. This Advisory Committee has identified several key features of such a framework. In the U.S. context, this might entail the development of a “Protocol” with a combination of key features: a description of how the federal antitrust enforcement agencies in the United States conduct joint and coordinated merger investigations with foreign authorities; model waivers permitting discussions otherwise prohibited by confidentiality laws and authorizing the exchange of statutorily protected information by competition authorities during a merger review; and a policy statement outlining safeguards established by competition authorities to protect confidential information. Other jurisdictions could usefully develop comparable protocols.

In addition, as competition enforcement authorities have come to recognize, the transactions they review also have the potential to generate spillover effects in other jurisdictions. In the short and medium term, enforcement authorities will naturally focus primarily on the effects that each transaction will generate within their own jurisdiction. The Advisory Committee thus considers whether it would someday be appropriate for enforcement authorities to cooperate in accounting for the global effects of a proposed transaction. That is, the Advisory Committee believes that agencies should develop *work-sharing arrangements* that would permit a coordinated process whereby the review undertaken by one agency would allow for participation by representatives from the other agencies. Work sharing may be accomplished in incremental steps with each step reflecting a different degree of cooperation and building upon successful approaches to cooperation and coordination that enforcement authorities have already implemented. An important objective is to reduce duplication in situations where the enforcement efforts of one agency may be sufficient to remedy the antitrust concerns of other jurisdictions, while preserving the right for the United States or other antitrust enforcement agencies to take their own measures, as necessary, if they believe the substantive analysis or remedies diverge from their approaches.

### **Facilitate Greater Transparency**

A first step in facilitating greater substantive convergence lies in understanding more clearly the merger review principles, practices, and procedures currently employed by various jurisdictions. This process would highlight differences in merger control laws and could stimulate international



discussion and adjustments.<sup>60</sup> For this reason, greater transparency in the application of each jurisdiction's merger review principles is desirable.<sup>61</sup> Examples of mechanisms that can be used to increase transparency are numerous. The Advisory Committee recommends that individual jurisdictions enhance transparency through the publication of guidelines and notices explaining the manner in which mergers will be analyzed; annual reports (including case examples), statements, speeches, and articles describing changes in relevant legislation, regulations and policy approaches; and case-specific decisions, releases, and press interviews. These sources could be made readily accessible by creating and maintaining websites.<sup>62</sup> At a multinational level, greater transparency may be achieved by surveying all jurisdictions with merger regulations and compiling an explanatory report of the principles they employ.<sup>63</sup>

Several jurisdictions already have undertaken efforts to improve transparency. Numerous enforcement agencies routinely publish annual reports and guidelines, and their enforcement officials regularly speak at conferences and make other public appearances. The Organization for Economic Cooperation and Development (OECD) facilitates transparency by compiling reports on the competition policies and practices of various jurisdictions. Several private enterprises also track and publish overviews of the merger reporting requirements and review principles of several jurisdictions around the world.<sup>64</sup>

The Advisory Committee agrees with the many witnesses at its hearing and outreach programs who have suggested that some jurisdictions need even more transparency with respect to specific enforcement decisions. It seems that transparency with respect to decisions on specific transactions lags behind transparency at the general policy level in some, if not most, jurisdictions.

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<sup>60</sup> The dissemination of public information on general policies and case-specific decisions also tends to encourage more consistent agency decisionmaking and encourage better risk appraisal by those contemplating mergers and other transactions (and clearer advice by their professional advisors). An important consideration, however, is how specific any guidance is and how accurately it reflects what is going on. Notably, the pronouncements will tend to be less useful as counseling devices if they are either tougher or less forceful than the actual court or agency decisions. Submission by Members of the International Antitrust Law Committee of the Section of International Law and Practice, ICPAC Hearings, at 21-26 (Apr. 22, 1999) [hereinafter Members of the ABA International Antitrust Law Committee Submission].

<sup>61</sup> Virtually all of the officials at ICPAC hearings advocated the promotion of increased transparency with respect to the merger review process. See ICPAC Hearings (Nov. 2, 1998), Hearings Transcript.

<sup>62</sup> The American Bar Association provides links to the websites to more than 35 competition authorities at <<http://www.abanet.org/antitrust/sites.html>>. In addition, this website provides links to other competition-related sites, including the APEC Competition Policy Database and the OECD Competition Law and Policy Division.

<sup>63</sup> A tool to facilitate this effort may lie in the creation of a Global Competition Initiative, discussed in Chapter 6.

<sup>64</sup> For a comparison of the laws of a number of jurisdictions, see J. William Rowley and Donald I. Baker, *INTERNATIONAL MERGERS: THE ANTITRUST PROCESS*, VOLS. I & II, 1996; Howard Adler, Jr., Lynda Martin Alegi and David A. Clanton, *THE GLOBAL MERGER NOTIFICATION HANDBOOK* (Cameron May Int'l Law & Policy 1999); *Getting the Deal Through: the International Regulation of Mergers and Joint Ventures*, GLOBAL COMPETITION REVIEW (2000).

Indeed, except for the EC, the level of transparency in the world for decisions on specific transactions is modest to nonexistent. To initiate a second-stage investigation, the EC must set forth reasons for the investigation, alerting the parties to the specific areas of concern. The EC also is required to make reasoned decisions on mergers, because it is both prosecutor and judge. The result is a large body of precedent to guide future parties and agency officials. In the United States, in contrast, there are few modern merger precedents. U.S. courts rarely rule on merger cases, and agency explanations of consent orders fail to provide sufficient insight into the reasons for the agency's action.<sup>65</sup> To their credit, the U.S. agencies have expanded analyses to aid public comment in connection with proposed consent decrees and issued detailed guidelines regarding application of the HSR rules and the standards for analyzing mergers and advisory opinions. Senior agency officials also have given more detailed substantive speeches.<sup>66</sup>

Written opinions, of course, may not be the answer in all situations. Staff resources, among other reasons, militate against publishing written decisions in all merger investigations. Another problem is that a system of written opinions imposes costs on those transactions that do not create competitive problems. Furthermore, while written decisions create a useful body of precedent, a requirement for a written decision can lead to a significant amount of work on issues that are peripheral to the transaction.

The dilemma between transparency and added burden is illustrated by a respondent to this Advisory Committee's merger case study questionnaire. This respondent explained that although Seagram's acquisition of PolyGram was primarily involved with the record business, Universal (a subsidiary of Seagram) and PolyGram also had some presence in music publishing and movie distribution in the United States and in Europe. In the United States, the FTC's concerns were assuaged with a short conference and reference to easily available market share data. In Europe, much more extensive filings were required before the issue was resolved.<sup>67</sup> Perhaps in recognition of this dilemma, the EU has issued a draft notice on a simplified procedure for processing certain

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<sup>65</sup> William J. Kolasky, Jr., and William F. Adkinson, Jr., *Report Your Deal to FTC, DOJ, EC, Etc.*, LEGAL TIMES, Nov. 2, 1998, at 544, 545, submitted by Mr. Kolasky for inclusion in the Advisory Committee record.

<sup>66</sup> Examples include a speech by Constance K. Robinson, Director of Operations, Antitrust Division, U.S. Dep't of Justice, Quantifying Unilateral Effects in Investigations and Cases, Before the George Mason Law Review Symposium (Oct. 11, 1996), on the use of analysis of next best substitutes in markets involving differentiated products as the basis not to challenge the Maybelline/L'Oreal merger; and a transaction between Interstate Bakers Corp./Continental Baking Co., two producers of white pan bread, and the Statement of Chairman Robert Pitofsky and Commissioners Janet D. Steiger, Roscoe B. Starek III and Christine A. Varney in the Matter of The Boeing Company/McDonnell Douglas Corporation, FTC File No. 971-0051.

<sup>67</sup> Submission by Kenneth R. Logan, Esq., Simpson Thacher & Bartlett, on behalf of himself and Edgar Bronfman, Jr., President and Chief Executive Officer, The Seagram Co., in response to Advisory Committee Multijurisdictional Merger Review Case Study questionnaire re the Seagram/PolyGram transaction, at 4-5 (March 26, 1999).



transactions that would eliminate written decisions for certain transactions that do not raise competitive concerns.<sup>68</sup>

Written decisions also present the danger of ossification -- creating a system where agencies may be overly concerned with following precedent and may therefore resist modifying their analysis even as antitrust analysis evolves or factual situations change. Finally, the agencies understandably are reluctant to acknowledge some decisions publicly. They may not want their interpretation of market-specific documentary evidence publicized, for example, or perhaps the government's theory is not backed up by sufficient witnesses.<sup>69</sup>

Despite these potential drawbacks, the Advisory Committee concludes that benefits can be achieved without adding undue burden by clearly articulating the rationales underlying decisions to challenge, as well as not to challenge, *significant* transactions. Significant transactions include those that set a precedent, use new doctrines, or otherwise indicate a shift in doctrine or policy. A useful model may be found in the Canadian approach. Canada has a long tradition of issuing detailed "backgrounders" when it decides not to challenge certain transactions. Backgrounders are not issued for every transaction, but only for a small number of high-profile transactions and transactions that raise novel issues. One Canadian lawyer explained that great value is placed on these backgrounders, in part because jurisprudence in the field is so limited.<sup>70</sup>

### **Develop Disciplines for Merger Review**

In addition to achieving a greater understanding of the various approaches to merger analysis currently in use, the Advisory Committee recommends that nations develop what this Advisory Committee is calling "disciplines" that they could agree upon for conducting merger review of transactions with significant transnational or spillover effects. The Advisory Committee outlines several disciplines that are simple yet aspirational, and they may not be feasible to implement in many jurisdictions at this juncture. The Advisory Committee believes, however, that if disciplines are adopted, they should be set at a high standard. That is, these disciplines are designed to promote best practices under any system as opposed to creating rules that would bring about convergence to the "lowest common denominator." The disciplines set out below are intended to be illustrative and applicable to all jurisdictions with competition regimes. Other principles of law as well as disciplines can and should be developed through international discourse.<sup>71</sup>

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<sup>68</sup> Draft Commission Notice on a simplified procedure for processing certain concentrations under Council Regulation (EEC) No 4064/89.

<sup>69</sup> Members of the ABA International Antitrust Law Committee Submission, at 25.

<sup>70</sup> *Id.*, at 25-26.

<sup>71</sup> See Fox, *Lessons from Boeing*.



1. Nations should apply their laws in a nondiscriminatory manner and without reference to firms' nationalities. In particular, nations should agree that competition enforcement efforts will not be targeted toward foreign firms for the purpose of protecting domestic firms or industries from competition. Further, nations should agree to refrain from using national champion policies to protect domestic firms or industries from foreign competition. Nations should neither enforce their competition laws nor withhold enforcement of their competition laws to further the interests of a national champion.
2. As a best practice or discipline, with limited exception (such as national security), noncompetition factors should not be applied in antitrust merger review. Where the law of a reviewing jurisdiction recognizes noncompetition factors (such as preservation of jobs, promotion of exports, international comparative advantage), those factors should be applied transparently and in a manner narrowly tailored to achieve their ends. Further, where a nation's merger regime explicitly permits noncompetition factors to trump traditional competition analysis, those noncompetition factors should be applied after the competition analysis has been completed.
3. Competition agencies do not operate in a political vacuum. Still, enforcement agencies must establish their independence and "parochial" political concerns should not play a role in the merger review process.
4. Benefits may be obtained from the participation of competitors and other third parties in the merger review process. Multijurisdictional merger review, however, provides an opportunity for competitors to encourage a single jurisdiction to hold a transaction hostage and thus use (or abuse) the process to delay and sometimes to disrupt mergers that can provide procompetitive benefits to consumers. Nations should recognize that the interests of competitors to the merging parties are not necessarily aligned with consumer interests and seek to minimize the problems that participation may cause, including the disruption of potentially efficiency-enhancing mergers.
5. When a transaction has a significant anticompetitive effect on the local economy in any given jurisdiction, the local antitrust authority has a legitimate interest in reviewing the transaction and imposing a remedy notwithstanding the fact that the transaction's "center of gravity" (whether determined by reference to the nationality of the parties, location of productive assets, or preponderance of sales) lies outside its national boundaries. Traditional comity principles should play a part in the exercise of prosecutorial discretion in appropriate cases, but nations should agree that any nation has the right to enforce its antitrust laws against a transaction that threatens to adversely impact competition in its markets. At the same time, in the face of a clash of jurisdictions, remedies with extraterritorial effects should

be narrowly tailored to cure the domestic problem.<sup>72</sup> Further, when fashioning a remedy with extraterritorial effects, the agency should take into account local practices and procedures in the foreign jurisdiction.

### **Continue to Enhance Cross-Border Cooperation**

To facilitate further substantive convergence and to avoid or minimize divergent analyses and outcomes, it is important for the United States and other jurisdictions to encourage and further deepen cross-border cooperation in reviewing mergers. Constant contacts enable staff to understand each other's analysis, lead to convergence in approaches toward competition matters, and benefit parties insofar as the agencies are often able to arrive at complementary remedies. Indeed, one of the basic propositions of the business community, as conveyed in its testimony and statements to the Advisory Committee, is general support for greater cooperation among antitrust enforcement agencies.

The recent proliferation of international mergers, acquisitions, and joint ventures offers many useful examples that illustrate how U.S. and foreign antitrust authorities interact during parallel merger reviews. Although the Boeing/McDonnell Douglas merger is perhaps the most commonly discussed case, there are many other examples of cooperation and coordination in the multijurisdictional merger review arena, particularly between the United States and the EU. Cooperation between these two jurisdictions in individual merger cases under the 1991 U.S.-EC Agreement has most frequently consisted of discussions and information exchanges regarding the timing of respective investigations; product and geographic market analyses, including the exchange of publicly available information about the relevant markets, applicable legal principles and precedents; possible anticompetitive effects of a merger, including how the staffs analyze competitive effects and other issues, such as entry, efficiencies, and failing firms. The U.S. agencies also have participated as observers in some European Commission hearings and the EC is exploring the possibility for its officials to attend, with the consent of the parties, certain key meetings between the U.S. competition authorities and the merging parties. In transactions that appear to have an anticompetitive effect, the staffs of the U.S. agencies and the EC also have discussed possible

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<sup>72</sup> Advisory Committee Member Eleanor M. Fox calls attention to the problem of clashes where one nation decides that a merger is anticompetitive and should be enjoined and another nation decides that a merger is procompetitive and should be allowed. In the absence of formal protocols for resolving the clash, the more restrictive nation always prevails. This member suggests that development of rules of priority in deciding to enjoin or not to enjoin an international merger may be needed. To be entitled to exercise such right of priority, however, the privileged jurisdiction would be required to accept the mantle of *parens patriae* for world competition. Accordingly, it would be obliged to count not only the net benefits within its borders, but all of the merger's costs and benefits to competition (under whatever neutral framework for analysis it applies). See Eleanor M. Fox, *Extraterritoriality and Merger Law: Can All Nations Rule the World?* Antitrust Report 2, Dec. 1999. Balancing a merger's costs and benefits is discussed in the section on the final stage of work sharing.



remedies to ensure that they do not conflict.<sup>73</sup> The United States has cooperated in a similar manner with other reviewing jurisdictions.

Although a great deal of cooperation can take place without the consent of the parties to a transaction, there are limits on the extent to which antitrust enforcers can exchange information and employ other cooperative approaches today. The principal limits are imposed by laws protecting confidential information. The confidentiality laws applicable to documents obtained in the course of merger review rarely, if ever, list foreign competition law enforcers among the permitted categories of recipients of such information. These laws have a particularly significant impact on the merger review process, because much of the information used to analyze a proposed transaction comes from extremely sensitive, confidential information relating to the companies' strategies, investment plans, and marketing goals and methods. It is this information that frequently proves most useful in analyzing a proposed transaction.

To the extent that cooperation could help ease the problems associated with multijurisdictional merger review, companies are often prepared to permit the antitrust authorities to discuss and exchange statutorily protected confidential business information. In the United States, merging parties and third parties, such as competitors, may choose to remove these limitations by providing voluntary confidentiality waivers. Cooperation pursuant to a waiver of confidentiality may allow the federal antitrust enforcement agencies and their foreign counterparts to assist each other in conducting their investigations more effectively, economize on scarce resources through coordinated joint investigation, and reduce (though not eliminate) divergent and conflicting analyses and remedies. Merging parties, therefore, often accept the incremental disclosure risks that could result from granting a waiver in the hope of a speedier, more consistent, and less costly and burdensome merger review process.<sup>74</sup>

In many cases where waivers have been granted, the agencies have been able to cooperate effectively based on discussions alone and have not needed to exchange documents. Indeed, the Advisory Committee is informed that it is unusual for an agency to share or even discuss particular

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<sup>73</sup> See John J. Parisi, U.S. Federal Trade Commission, Enforcement Cooperation Among Antitrust Authorities, Before the IBC UK Conferences Sixth Annual London Conference on EC Competition Law (May 19, 1999)(updated Nov. 1999) [hereinafter Parisi, IBC Address]; Commission Report to the Council and the European Parliament on the Application of the Agreement between the European Communities and the Government of the United States of America Regarding the Application of their Competition Laws, Jan. 1, 1998 to Dec. 31, 1998 (April 2, 1999).

<sup>74</sup> See Submission by the International Chamber of Commerce, "ICC recommendation on exchange of confidential information between competition authorities in the merger context," ICPAC Hearings (Apr. 22, 1999), at 2 [hereinafter Int'l Chamber of Commerce Submission]. To date, the DOJ has obtained waivers in roughly 13 merger investigations and the FTC received waivers in approximately 11. See Baer June 15, 1999 Letter; Letter from Constance K. Robinson, Director of Operations & Merger Enforcement, U.S. Dep't of Justice, Antitrust Division, to James F. Rill and Dr. Paula Stern (July 14, 1999).



documents with another agency.<sup>75</sup> In some cases, the parties may opt to provide like sets of documents to each reviewing agency and waive confidentiality to permit discussion of the documents produced. Rarely, however, do the agencies transmit documents directly, and when they do, rarely are more than a handful exchanged.

In a number of these instances, the cooperating authorities were able to devise compatible remedies. In other cases, one of the reviewing authorities was able to devise a remedy that obviated the need for another interested jurisdiction to impose its own remedy. In yet other cases, one agency deferred to another, leaving the merging parties with only one reviewing authority to satisfy.<sup>76</sup> Outcomes like these can reduce the sometimes significant costs to the merging parties of satisfying different authorities. The WorldCom/MCI transaction, where the Department of Justice and the EC cooperated with each other throughout their investigations of the proposed merger, has been cited as one of the best examples of cooperation (Box 2-A).

#### **Box 2-A. WorldCom/MCI: Example of Cooperation**

In the WorldCom/MCI transaction, the Department of Justice and the EC cooperated with each other throughout their investigations. With the consent of the parties and some third parties, the agencies were able to discuss both information gathered in the investigation and possible antitrust concerns arising from the merger. Had the parties not provided the agencies with waivers that allowed this information sharing, statutory confidentiality provisions would have severely limited the agencies' ability to discuss the relevant facts.

According to DOJ staff, this cooperation between the agencies proved beneficial to the parties, the DOJ, and the EC in several respects. First, it enabled the agencies to coordinate requests for information and thus minimize the possibility of sending duplicative and conflicting requests to the parties and to third parties. Second, it allowed each agency to explore fully, with the benefits of information gathered through compulsory process, the concerns and tentative conclusions of the other throughout the investigation, thus reducing the likelihood of inconsistent conclusions at the end. Finally, cooperation between the agencies during settlement discussions, including joint meetings with the parties, helped the DOJ and EC to reach a conclusion that satisfied all concerns in the most efficient manner.

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<sup>75</sup> Rather, the waivers enable the agencies to discuss the quality of the evidence that supports a particular theory, a discussion that may require reference to confidential information that otherwise would be prohibited.

<sup>76</sup> Nina L. Hachigian, then-attorney advisor to Chairman Pitofsky of the U.S. Federal Trade Commission, *An Overview: International Antitrust Enforcement*, 12 ANTITRUST 22, Fall 1997. Some foreign antitrust enforcement officials noted at the ICPAC Hearings that cooperation is producing a degree of soft harmonization and the spirit of deference. For example, in some instances the U.S. government response addresses the same competition policy concerns that foreign jurisdictions have. See Van Miert ICPAC November Hearings Testimony, at 126-27; Testimony of Konrad von Finckenstein, Commissioner of Competition, Competition Bureau, Canada, ICPAC Hearings (Nov. 2, 1998), Hearings Transcript, at 121-22 [hereinafter von Finckenstein ICPAC November Hearings Testimony].

One important step in fostering this mutually beneficial cooperation between companies and competition authorities lies in instilling confidence in companies that the jurisdictions receiving confidential information can and will protect that information from disclosure.<sup>77</sup> Currently, there are no common international standards for international agency cooperation and on exchanging and protecting confidential information. Rather, information is shared on an ad hoc basis. The Advisory Committee worked closely with business groups, bar associations, and other antitrust practitioners, among others, to develop a framework to facilitate effective cooperation.<sup>78</sup>

Some disagreement exists among these groups concerning whether confidentiality laws should be amended to permit antitrust authorities to exchange confidential business information in multijurisdictional merger review. Proponents suggest that confidentiality concerns are overstated and advocate elimination of the exemption in the International Antitrust Enforcement Assistance Act (IAEAA) that prohibits disclosure of initial filings and second-request documents submitted to the U.S. federal antitrust agencies under the HSR Act.<sup>79</sup> According to several government officials, reality does not support the perception that leaks occur. Enforcement agencies routinely obtain and safeguard much sensitive business information, and the agencies have self-interested reasons for doing so. A number of officials at ICPAC hearings commented that there have been no leaks of confidential information in their jurisdictions from governments, including in the pre-filing

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<sup>77</sup> The use and management of confidential information in enforcement cooperation in the nonmerger areas is discussed in Chapter 4 of this Report.

<sup>78</sup> These groups included the Working Group of the Antitrust and Trade Committee of the International Bar Association, the Commission on Law and Practices Relating to Competition of the International Chamber of Commerce, and the American Bar Association Section of Antitrust Law, among others.

<sup>79</sup> Advisory Committee Member Eleanor M. Fox believes that business overclaims “confidentiality” for its business records, and that these blanket claims obstruct efficient, enlightened interagency communication, analysis, and enforcement. She believes that merger filings should not have been excluded from the IAEAA: Of all the areas in which multiagency use of the same information to vet the same transaction can enhance understanding, enforcement, and convergence of law and remedies, mergers rank first. The IAEAA enables the U.S. antitrust authorities to enter mutual assistance agreements that permit sharing confidential business information provided the receiving jurisdiction has adequate safeguards to protect the information. *See IAEAA*, Pub. L. No. 103-438, 108 Statutory. 4597, 15 U.S.C. §§ 6200-6212, particularly § 12, which requires, among other things, that an antitrust mutual assistance agreement contain: “an assurance that the foreign antitrust authority is subject to laws and procedures that are adequate to maintain securely the confidentiality of antitrust evidence ... and will give protection to antitrust evidence received under such section that is not less than the protection provided under the laws of the United States to such antitrust evidence”; citations and descriptions (including enforcement mechanisms and penalties) of the applicable confidentiality laws in each jurisdiction; “terms and conditions that specifically require using, disclosing, or permitting the use or disclosure of, antitrust evidence received under such agreement or such memorandum only -- (i) for the purpose of administering or enforcing the foreign antitrust laws involved, or (ii) with respect to a specified disclosure or use requested by a foreign antitrust authority and essential to a significant law enforcement objective, in accordance with the prior written consent that the Attorney General or the Commission, as the case may be, gives after -- [making various additional determinations]”; the return of the evidence at the conclusion of an investigation; and automatic notification and termination provisions if confidentiality violations occur.



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consultation phase that occurs in some jurisdictions (such as the EC and Canada). The agencies' ability to maintain business confidences helps them to obtain such confidences in the future.<sup>80</sup>

Others argue that confidential information should only be exchanged with the consent of the party (or parties) from whom the information was obtained.<sup>81</sup> Given the significant concerns that surround the sharing of confidential information it is unlikely in the short term that legislative change to permit agencies to share HSR information without the consent of the parties is feasible or desirable.

A broad consensus exists on one fundamental point. Cooperation and the exchange of confidential information between enforcement agencies should occur within a transparent legal framework that contains appropriate safeguards to protect the privacy and fairness interests of private parties. Several business groups and bar associations that appeared before the Advisory Committee stressed a need for antitrust enforcement agencies to help businesses and their advisors better understand the international cooperative process with particular emphasis on how voluntary confidentiality waivers can benefit merging parties.

### **Develop a Framework for Cooperation and the Exchange of Confidential Business Information**

The Advisory Committee begins with the premise that a framework for cooperation must adequately balance the concerns of the enforcement agencies with those of business. Enforcement authorities are concerned that a framework for cooperation might entail additional burdens on agency staff, delays in the process, and prejudice to the investigation, while firms want assurances that agencies will be accountable for safeguarding confidential material from disclosure; for providing due process, including notice that information is being transferred to a foreign governmental authority; and for ensuring transparency in the processes involved. Keeping in mind this need for balance, the Advisory Committee recommends the creation of a framework for cooperation. The Advisory Committee has identified several key features of such a framework. In the U.S. context, this might entail the development of a "Protocol" with the following key features: a description of the way in which the federal antitrust enforcement agencies typically will conduct joint and coordinated merger investigations with antitrust authorities in other jurisdictions; a range of model waivers permitting discussions otherwise prohibited by confidentiality laws and authorizing the exchange of statutorily protected information by competition authorities during merger reviews; and a model policy statement outlining safeguards established by competition authorities to protect

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<sup>80</sup> Parisi, IBC Address; Testimony of Dieter Wolf, President, German Federal Cartel Office, ICPAC Hearings (Nov. 2, 1998), Hearings Transcript, at 140-41, Van Miert ICPAC November Hearings Testimony, at 141, 157; Testimony of Allan Fels, Chairman, Australian Competition & Consumer Commission, ICPAC Hearings (Nov. 2, 1998), Hearings Transcript, at 145-56; von Finckenstein ICPAC November Hearings Testimony, at 144 (government officials testifying to a record of no leaks in their jurisdictions.)

<sup>81</sup> Int'l Chamber of Commerce Submission, at 3; Testimony of Phillip A. Proger, Jones, Day, Reavis & Pogue, ICPAC Hearings (Apr. 22, 1999), Hearings Transcript, at 40 [hereinafter Proger ICPAC Spring Hearings Testimony].



confidential information. Other jurisdictions could usefully develop comparable protocols. Another aspect of cooperation that should be emphasized in the future is the exchange of staff between antitrust authorities, thereby permitting the cross-fertilization of competition law approaches.

### *Protocol for Cooperation in Merger Investigations*

Given the extensive and well-developed cooperation that has taken place in recent years, the Protocol could reduce to writing the approach that the DOJ and FTC staff have been using. The Protocol should describe the cooperative process in transactions where waivers have been granted and those where they have not. Successful instances of cooperation could then be emulated in future cases whenever the legal and factual situations indicate that such cooperation would be useful. Agencies' experience in cooperation should help to identify where the process tends to break down and areas of possible improvements.

A useful model may be the Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and State Attorneys General. This protocol sets forth a general framework for the conduct of joint federal and state investigations with the goals of maximizing cooperation between enforcement agencies and minimizing the burden on private parties. The first section lists specific steps for maintaining the confidential status of the shared information. The second section details the procedures under which the FTC and DOJ will provide state attorneys general with certain types of sensitive information. Guidelines for conducting a joint investigation are detailed in the third section, and the fourth section emphasizes the importance of close collaboration on the settlement process. The final section of this protocol addresses how the agencies should coordinate the release of information to the news media.<sup>82</sup>

### *Model Waivers of Confidentiality*

While waivers have been used successfully in many recent mergers and occasionally in other cases, the current practice is ad hoc. The Advisory Committee recommends that to provide the most consistency and transparency, agencies should develop standardized (but not inflexible) and transparent templates for waivers.

Attached is a range of models that contemplate limited as well as broad waivers of confidentiality (Annex 2-D). The first model encompasses a waiver of confidentiality protections covering discussions between U.S. enforcement authorities and reviewing authorities in other jurisdictions that also are investigating the proposed transaction. This waiver would permit discussions that would otherwise be foreclosed by the confidentiality rules of the participating jurisdictions, but does not encompass the exchange of documents.

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<sup>82</sup> Protocol For Joint Federal/State Merger Investigations (Mar. 11, 1998), *reprinted at*, 6 Trade Reg. Rep. (CCH) ¶13,420.



The second model waiver contemplates that the parties would provide a discrete set of documents to the reviewing agencies and would waive confidentiality to permit discussion of those documents and the information contained therein.<sup>83</sup> This approach would perhaps be most useful during the initial review period or at the remedies phase to facilitate settlement. Alternatively, this waiver could be used to permit discussion with respect to certain products or issues -- such as market definition, barriers to entry, or remedies. For example, in Chapter 3, the Advisory Committee recommends that for transactions that raise potential antitrust concerns, agencies should encourage merging parties voluntarily to provide additional information at the initial filing stage to enable the notified jurisdiction to resolve any potential antitrust issues or to conduct a focused second-stage inquiry. Merging parties using this second model waiver could provide this information to notified jurisdictions where the transaction may raise concerns and waive confidentiality to permit discussion generally or with respect to those documents in particular.<sup>84</sup>

The third model waiver is the broadest and is modeled on a number of waivers used in recent multijurisdictional mergers. Under this waiver, merging parties would authorize the reviewing authorities in various jurisdictions to discuss and exchange documents, graphics, and the internal analyses of those enforcement authorities, all of which otherwise would be foreclosed by the confidentiality rules of their respective jurisdictions. Recognizing the differences among jurisdictions regarding legal privilege (particularly the differences between the United States and the EU in their treatment of in-house counsel advice), this waiver excludes materials asserted to be privileged, including correspondence sent to and from in-house counsel and legal advice given by in-house counsel. This waiver is designed so that the merging parties do not waive their rights to assert applicable privileges pertaining to such materials, including the attorney work product or attorney-client privileges.

The model waivers are drafted so that each party could submit a single waiver to the reviewing authorities. Each model contemplates that the reviewing agencies will continue to protect the confidentiality of the information in accordance with their normal practices and confidentiality

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<sup>83</sup> Bar associations and business groups that appeared before the Advisory Committee agreed that information exchanged should be limited to the necessary minimum. Some groups favored limited or restricted waivers, which would require the competition authorities to specify the documents or types of documents reasonably necessary to address important issues in an investigation that can be exchanged. Others suggested particularizing the specific issues that the agencies have identified as warranting exchanges in order to expedite and coordinate their merger reviews rather than focusing on particular documents. This second waiver attempts to provide for both options. *See* Int'l Chamber of Commerce Submission, at 4-5; Submission by a Working Group of the Antitrust and Trade Committee of the International Bar Association, "Waivers of Confidentiality to Facilitate Exchanges of Confidential Information Between Competition Law Enforcement Agencies During International Merger Reviews," at 1 (Sept. 17, 1999) [hereinafter IBA Working Group Sept. 17, 1999 Submission].

<sup>84</sup> As discussed in Chapter 3, the development of a model voluntary submission list at the international level by organizations such as the OECD would facilitate the submission of common underlying data to each jurisdiction and further enhance the cooperative process. *See also* Testimony of Simon J. Evenett, The Brookings Institution; Department of Economics, Rutgers University, ICPAC Hearings (May 17, 1999), Hearings Transcript, at 80-81.

rules. The waivers do not purport to make commitments on behalf of another agency or impose an obligation on one jurisdiction to act as the “guarantor” of another jurisdiction regarding the protection of confidential information.

### *Policy Statement*

Each antitrust enforcement authority also should issue a short written policy statement to increase transparency and build private sector confidence regarding the safeguards established to protect confidential information and the manner in which the authority intends to operate. This step is particularly important in many jurisdictions around the world where confidentiality safeguards are less developed or are not transparent.

At the request of the Advisory Committee, the Working Group of the Antitrust and Trade Committee of the International Bar Association prepared a recommended framework for policy statements. A model policy statement based on this submission is attached as Annex 2-E.<sup>85</sup> As elaborated in the attached model, these policy statements should define the term “confidential information” and include a summary of relevant confidentiality laws and rules, with full descriptions of any material gaps or exceptions (including discovery rules and freedom of information laws) and the manner in which any discretionary provisions are interpreted and applied. The statement also should set out any significant policies or practices related to information exchanges with other agencies, and it should state the agency’s practice regarding destroying documents at the end of the investigation. The policy statement should be updated when material changes are made in the way confidentiality protections are interpreted and applied or as other policies or practices are developed.

Of particular importance is the principle that waivers of confidentiality should be truly voluntary. The policy statement should explicitly confirm that no negative inference will be drawn from a party’s decision not to grant a waiver.<sup>86</sup> A number of hearing participants and other outreach respondents raised the concern that enforcement agencies seemingly believe that there are no legitimate grounds for refusing a request to cooperate. Some practitioners have indicated that some jurisdictions respond to initial refusals (or expressed unwillingness) to waive by asking what the

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<sup>85</sup> IBA Working Group Sept. 17, 1999 Submission. Another useful model may be found in the U.S. Department of Justice Antitrust Division Manual where the Antitrust Division has published model letters articulating the DOJ’s treatment of confidential information received in response to civil investigative demands and voluntary requests for information. *See* U.S. Dep’t of Justice, Antitrust Division Manual, (Feb. 1998 3rd Ed.), at III-13; *see also* models provided by the FTC in Chapter 15 of its Operating Manual.

<sup>86</sup> Outreach respondents note that while this principle is easy to state (and should be included in the policy statements), enforcement officials have innumerable opportunities to use their discretion as leverage in an investigation. *See, e.g.*, Exchanges of Confidential Information Between Antitrust Enforcement Agencies Submission by a Working Group of the Antitrust and Trade Committee of the International Bar Ass’n, ICPAC Hearings (Apr. 22, 1999), at 13-14 [hereinafter IBA Working Group Apr. 22, 1999 Submission].



merging parties have to hide.<sup>87</sup> This attitude of some enforcement officials ignores the fact that there may be legitimate reasons to seriously consider not waiving confidentiality.

Several participants at ICPAC hearings suggested, for example, that the benefits to private parties arising from information sharing and other forms of cooperation often will not be substantial or assured, and may be outweighed by a variety of perceived disadvantages.<sup>88</sup> These potential disadvantages include exposure to additional legal risks, particularly when substantive laws are different and there are significant potential sanctions or private rights of action in the jurisdiction to which information is disclosed; differences in investigation timetables, which may inhibit the realization of time and cost savings; the overburdening of competition authorities with so much information that investigations would be slowed down rather than hastened; and possible misinterpretations when one authority reviews information that has been prepared to address issues under a different legal regime.<sup>89</sup> Government officials suggest that companies examine these

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<sup>87</sup> ABA Antitrust Section Multijurisdictional Merger Review Submission, at 25; Submission by John Ratliff, Wilmer, Cutler & Pickering, in response to Advisory Committee Multijurisdictional Merger Review Case Study questionnaire re the Boeing/McDonnell Douglas transaction (April 2, 1999), at 7 (“It is very difficult to resist [the request for copies of filings to another authority] without raising the suspicion that a party has something to hide.”)

<sup>88</sup> The extent to which the merging parties and the reviewing authorities will benefit from cooperation during the review of a particular transaction will depend on market dynamics and other factors specific to each individual transaction and investigation. Antitrust counsel suggest that the benefits of information sharing and cross-border collaboration seem clear when a proposed transaction involves two parties that compete directly in one or more global markets, because similar and overlapping issues will need to be addressed in every jurisdiction. In contrast, the benefits of cross-border cooperation in the review of a proposed merger may be more modest where few jurisdictions are affected, relevant geographic markets are local rather than international, market structure and competitive conditions vary greatly within such markets, and competition concerns arising in any country would most naturally be remedied by divestitures of one of the merging parties’ local subsidiaries. Rowley and Campbell Submission, at 30. One submission questioned how frequently situations arise in which there is a realistic prospect of inconsistent remedies that could be avoided by closer coordination through waivers. According to the respondent, most cases involve different production assets serving different geographic areas, so that relief will be jurisdiction specific. It was suggested in such cases that the agencies have yet to make the case for cooperation and voluntary waivers to avoid inconsistent results. ABA Antitrust Section Multijurisdictional Merger Review Submission, at 26-27. As the statement implies, however, there also are situations in which production assets located in one jurisdiction serve a broader region. In such cases, jurisdiction-specific remedies may not be feasible.

<sup>89</sup> IBA Working Group Apr. 22, 1999 Submission, at 6. As an example, the ABA Antitrust Section offers the hypothetical case of a substantial aerospace merger investigated by the European Commission and one of the U.S. antitrust enforcement agencies. Europe has aerospace companies that have received a great deal of state aid over the years from countries such as France, Germany, and the United Kingdom. Under EC rules, a copy of the file must go to the antitrust authorities in each and every EU member state. American companies involved in such an investigation might be unwilling to waive confidentiality for fear that some of their sensitive information will end up in the hands of the companies that receive state aid. The concern exists because the U.S. authorities usually demand production (through the second-request process) of a great deal of highly sensitive business information, whereas the EC and member states frequently conduct their investigations with far less documentary material. According to the ABA Antitrust Section, it does not necessarily matter if the fear of improper disclosure is well founded. The perception and the harm that could come with the disclosure may be enough to justify not waiving. The ABA Antitrust Section points



concerns on a case-by-case basis, however daunting they may appear in general terms, balancing the potential harm that could result against the potential benefits from sharing information with a foreign enforcement authority.<sup>90</sup>

The idea behind the model waivers is that they would not impose on an agency any obligations beyond acting in accordance with its normal practices and confidentiality rules (as described in the policy statement). Representatives of the business community and private bar that appeared before the Advisory Committee strongly believe, however, that exchanged information should only be used for purposes of domestic merger reviews and that there should be no “downstream” disclosure of confidential information to other governmental agencies or private parties.<sup>91</sup> In most jurisdictions, discovery rules in private litigation, freedom-of-information laws, and other gaps or exceptions in statutory confidentiality protections prevent antitrust enforcement authorities from providing such complete assurances.<sup>92</sup> These groups contend that removing these gaps and exceptions in the protection of confidential information exchanged between antitrust enforcement agencies would give the business community greater confidence and promote the use of waivers.

One suggested approach advocated by these groups to removing these exceptions calls for amendments to legislation in the United States and abroad. This approach would require explicit statutory confirmation that all received information would be subject to strict statutory confidentiality protections and that freedom-of-information laws and discovery rules could not be used to compel disclosure; some jurisdictions also would have to override broad waiver-of-privilege doctrines.<sup>93</sup> Another approach, adopted by the IAEEA, contemplates that a recipient agency will

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to other situations where refusing to waive might make sense. Assume that one of the reviewing jurisdictions appears to have already made up its mind to oppose the deal, while the other seems to have an open mind. The merging parties might want to keep the undecided agency from being influenced by the opposing agency. The ABA recognizes that in some circumstances the judgment on waiver might go the other way. It may be that the undecided agency might be able to convince the one that seems not to have an open mind. ABA Antitrust Section Multijurisdictional Merger Review Submission, at 25-26.

<sup>90</sup> See Parisi, IBC Address.

<sup>91</sup> For example, no opportunity for other government departments or entities (including state enterprises which may be competitors), subfederal agencies (e.g. U.S. state attorneys general, EU member state agencies, etc.) or third parties to obtain the exchanged information. IBA Working Group April 22, 1999 Submission, at 9; Int’l Chamber of Commerce Submission, at 4.

<sup>92</sup> One gap in the United States, for example, is the power of Congress to obtain information in the possession of the DOJ or FTC. See IBA Working Group Sept. 17, 1999 Submission, at 2 n.3.

<sup>93</sup> The discovery exposure can arise in two ways: “third party” discovery of an agency that has information in its possession that may be relevant to a private competition law action; or “indirect” discovery of an opposing litigant by cross-reference to information which may have been provided to an enforcement agency (such as, “provide copies of any documents which party A submitted to Agency Y that may have been exchanged with Agency Z.”). To be fully

respect any conditions on the use of confidential information which are imposed by the disclosing agency.<sup>94</sup> Proposals for an international treaty that would provide similar safeguards also have been advanced. Most recently, a proposal by J. William Rowley and A. Neil Campbell would leave existing domestic merger review regimes intact, while committing signatories to an “overlay” of procedural rules and information-sharing protocols for cross-border mergers that would override domestic laws and stipulate that confidential information would not be used for other purposes or disclosed.<sup>95</sup>

These strong safeguards would go a long way to foster business confidence and thereby encourage the use of waivers and perhaps pave the way for the statutory authority to exchange confidential information without the need to obtain a waiver of confidentiality. At this juncture, however, the Advisory Committee believes that these measures are not needed to facilitate cooperation. Provided that the exchange of confidential business information is limited to those jurisdictions with safeguards equal to or greater than the protection provided in the jurisdiction disclosing the information, the Advisory Committee believes that interests of business and enforcement agencies will be adequately balanced with the development of a protocol that spells out how agencies will cooperate to conduct joint and coordinated merger investigations and the adoption of model waivers coupled with a policy statement outlining safeguards established in the reviewing jurisdiction to protect confidential information.<sup>96</sup>

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effective in protecting information exchanged between competition law enforcement agencies, these groups argue, it would be necessary for an amendment to close off both the third party and indirect discovery channels. *See* IBA Working Group Sept. 17, 1999 Submission, at 2 n.4; *see also* Proger Spring Hearings Testimony, at 52-53.

<sup>94</sup> IAEAA §8(a)(1)(B).

<sup>95</sup> Rowley and Campbell Submission. Parties to transactions that trigger a notification obligation in two or more signatory jurisdictions could elect to proceed under the treaty. As a prerequisite, merging parties would be required to waive confidentiality and provide signatory jurisdictions with a list in the initial filing of all the jurisdictions in which premerger notification has been made. Each reviewing jurisdiction would have the ability (although not the obligation) to disclose confidential information to other signatories and would be required to keep other agencies and the merging parties informed about the progress of its review either periodically or when events, such as a change in the status of the investigation warranted, or some combination of the two. A jurisdiction could not transmit the information to other federal or state government agencies or third parties without the express written consent of the party that provided the information, and third parties would be precluded by law from using freedom-of-information requests, discovery procedures, or other means to acquire confidential information transmitted or received by any agencies in a signatory jurisdiction. The treaty proposal also provides incentives by attempting to reduce transaction costs with a common filing form, two-stage prenotification and uniform time limits. The Advisory Committee addresses ways to reduce transaction costs in Chapter 3 of this Report.

<sup>96</sup> As reflected in testimony and submissions made to the Advisory Committee, there are many jurisdictions where private parties and their advisors might not have confidence in the existing legal or practical levels of confidentiality protections. These hearings participants suggest that United States pursue bilateral agreements with a small number of jurisdictions with which there are high volumes of cross-border cases, an established history of cooperation (such as Canada, the EC, and some member states), and an established record of protecting confidential business information. Additional jurisdictions could be added if they comply with the conditions similar to those contained in the IAEAA.



Over the longer term, particularly in the event cooperation takes on more of a documentary sharing dimension, further consideration of these statutory changes or a treaty among jurisdictions may be advisable.<sup>97</sup> In the meantime, to instill further confidence, the Advisory Committee recommends that each agency using waivers of confidentiality affirm its intention to refuse to disclose information except to the extent it is legally required to do so, to use best efforts to resist disclosure to third parties (including the assertion of any privilege claims or disclosure exemptions that may apply), and to provide such notice as is practicable before disclosing to a third party any confidential business information obtained pursuant to a waiver. The policy statement should explain how concepts such as using best efforts to resist disclosure to third parties are implemented on a domestic basis. This step would better enable merging parties and their advisors to consider whether, in the unique circumstances of their transaction, a waiver advances the mutual interests of the merging parties and antitrust enforcers or potentially subjects them to incremental disclosure risks or further liability.

### *Notice of Information Exchange*

Jurisdictions also should consider adopting a policy commitment to provide notice to the parties -- either before or after the fact -- when they share documents of that party with another jurisdiction.<sup>98</sup> The Advisory Committee can well understand why an enforcement agency would be unwilling to agree to a blanket commitment to provide notice. Doing so may jeopardize an investigation. However, when an agency has the authority to exchange information and when adverse enforcement consequences are not present, then notice to the parties seems reasonable and proper.

This suggested approach does sometimes occur in the United States. The agencies may find it impractical to require advance notice on each individual document that is shared. Furthermore, they may be concerned about revealing their selection of key documents (which may constitute attorney work product) outside the scope of discovery. Rather, parties that have concerns with

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*See* IBA Working Group April 22, 1999 Submission, at 2-3. One hearing participant suggested that guidelines would be easier to formulate and implement and because guidelines are less formal than a binding agreement, they would allow for regular public standard setting and eventual refinement based on experience. Submission by Calvin S. Goldman, Q.C., Davies, Ward & Beck, "Multijurisdictional Merger Review: Information Sharing and Procedural Harmonization," ICPAC Hearings, at 4 (Nov. 3, 1998).

<sup>97</sup> However, as an initial matter, the Advisory Committee questions the advisability of limiting the use of information obtained pursuant to a waiver to the merger investigation. This would prevent the use of information to commence or further a cartel investigation. Indeed, no such limitation is placed in the use of HSR materials. Rather, merger documents may be used by the Department of Justice for a legitimate law enforcement purpose.

<sup>98</sup> A number of groups highlighted the importance of notice and the need for companies to be given the opportunity to explain any transmitted information that could be misinterpreted. *See, e.g.*, Int'l Chamber of Commerce Submission, at 3.



respect to the sharing of certain documents could identify beforehand those documents or categories of documents that the agencies could share without advance notice, although in certain cases this may limit the benefits that potentially could be realized through the cooperative process.

## **Develop Work-Sharing Arrangements**

The Advisory Committee views the creation of a nearly seamless multijurisdictional merger review system as the ultimate goal of all of these efforts toward expanded cooperation and coordination. A seamless system of international merger review is the best way to cut back transaction costs, preserve scarce prosecutorial resources, subject potentially anticompetitive transactions to thorough review, minimize parochial actions, and account fully for global competitive effects. The Advisory Committee recommends work-sharing arrangements among jurisdictions as the appropriate next step in developing this nearly seamless system. Work sharing may be accomplished in incremental steps with each step reflecting a different degree of cooperation and each step built upon successful approaches to cooperation and coordination that enforcement authorities have already implemented. The Advisory Committee thus looks at two areas in which work sharing might successfully operate: in the remedy stage and in the review stage.

### *Work Sharing in the Remedy Stage*

To obtain the full benefits that cross-border cooperation can provide, it is important to focus on cooperation and coordination in the negotiation of remedies. Because coordination during the remedies phase already has been successfully employed in several cases, this phase may offer the best opportunity for starting a work-sharing arrangement. The Advisory Committee believes that successful instances of cooperation and coordination at the remedies phase should be emulated in future cases whenever the legal and factual situations indicate that such coordination and cooperation will be useful. The coordination of remedies is particularly important when remedies could affect conduct in more than one jurisdiction or the feasibility of remedies being considered by other jurisdictions. The goal at the remedies phase should lie both in avoiding conflicting remedies as well as avoiding a mix of remedies that may overly burden an otherwise competitively benign or efficiency-enhancing transaction.

There are several approaches to coordinating remedies. One lies in *joint negotiation*. Under this approach, each interested jurisdiction would identify its concerns regarding the likely anticompetitive effects of the proposed transaction. The enforcement authorities of the reviewing jurisdictions then jointly would consider the remedies required to address their concerns regarding the anticompetitive effects of the proposed transaction and jointly would negotiate those remedies with the merging parties. Each jurisdiction would implement its own consent decree that incorporates the jointly negotiated remedies.<sup>99</sup> Such an approach would require the parties to

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<sup>99</sup> *ABB/Elsag Bailey* and *Astra/Zeneca* are two cases during 1999 that illustrate how effective this approach can be when the parties agree to cooperate. *ABB/Elsag Bailey*, EC Case No. IV/M.1339 (Dec. 16, 1998); *In re ABB AB and ABB*

cooperate by coordinating the timing of the filings in the relevant jurisdictions and agreeing to negotiate jointly.<sup>100</sup> A waiver to permit cooperation among the reviewing jurisdictions also would be necessary. The parties could send a “remedy package” to each jurisdiction and provide a waiver that permits discussion of those documents and related issues.

In some cases it may be feasible to have only *one jurisdiction negotiate remedies with the merging parties that will address the concerns of both that jurisdiction and other interested jurisdictions*. In other words, the reviewing jurisdictions would identify the remedies necessary to address their competitive concerns, and the jurisdiction best positioned to negotiate and obtain the desired remedies would do so. An approach of this kind, for example, was successfully employed by the United States and the EU in the Halliburton/Dresser transaction. There, rather than negotiating separate undertakings with the merging parties, the EC relied on the provisions of a U.S. consent decree to satisfy its concerns regarding a perceived global problem in drilling fluids.<sup>101</sup>

To some extent this approach also was employed in the Federal Mogul/T&N merger.<sup>102</sup> There, the FTC coordinated review efforts closely with the enforcement agencies in France, Germany, Italy, and the United Kingdom. The German Federal Cartel Office was concerned that the merger threatened competition in dry bearings. Although it appears that the FTC itself was not

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AG, FTC Dkt. No. C-3867 (Apr. 22, 1999), *reported in* 5 Trade Reg. Rpt. (CCH) ¶ 24,552; Astra/Zeneca, EC Case No. IV/M.1403 (Feb. 26, 1999); In re Zeneca Group plc, FTC Dkt. No. C-3880 (June 10, 1999), *reported in* 5 Trade Reg. Rpt. (CCH) ¶ 24,581.

<sup>100</sup> In some cases, coordinating settlement negotiations or divestitures when the two investigations are not on the same timetables may be difficult. To address this, some have suggested harmonizing triggering events and review periods. See discussion in Chapter 3 of this Report. However, others suggest that procedural differences are not an insurmountable stumbling block. For example, parties to mergers notifiable to both the United States and EC can facilitate cooperation by filing first in the United States on a letter of intent (which they cannot do in the EC) and beginning prenotification consultation with the EC. See Parisi, IBC Address.

<sup>101</sup> See Van Miert ICPAC November Hearings Testimony, at 52; see also von Finckenstein ICPAC November Hearings Testimony, at 121-122 (observing that when the case requires a remedy that can be effected in the United States, Canada may be able to “piggyback” on a U.S. remedy and have it apply to Canada too; alternatively a parallel consent order may be required in Canada, but often the main negotiation can be done in the United States. “And thanks to this cooperation, very often the United States can address implicitly Canadian concerns so that the resulting order can serve on both sides of the border. To the extent the case is the other way around, we can do the same thing. But the economic reality dictates that most of these cases create the biggest problems in the United States rather than in Canada.”).

<sup>102</sup> See Submission by Mark W. Friend and Antonio F. Bavasso, Allen & Overy, in response to Advisory Committee Multijurisdictional Merger Review Case Study questionnaire re the Federal-Mogul/T&N transaction (April 14, 1999). The transaction was notified in six jurisdictions: Belgium, France, Germany, Italy, the UK, and the United States. There was no competitive issue in Belgium and thus the Belgian authorities unconditionally cleared the transaction one month after receiving notice. For this reason, there was no coordination with the Belgian Authority. In many respects, Federal-Mogul/T&N was a ground-breaking case in international cooperation. However, Mr. Friend and Mr. Bavasso contend that the protracted and sometimes seemingly circular nature of the proceedings suggests that there is still considerable scope for improvement.



concerned about anticompetitive effects in dry bearings (this product market was not identified in the complaint as a line of commerce that would sustain a substantial lessening of competition if the merger were permitted), the FTC included in its consent agreement a provision for divesting dry bearings units to satisfy the German concerns and to allow Federal Mogul to avoid entering a separate divestiture proceeding in Germany.

Considering *ultra vires* issues that may be raised, however, this latter approach may be workable only when the remedy exacted by a jurisdiction does not go beyond what is necessary to satisfy that jurisdiction's concerns.<sup>103</sup> If there are distinct national markets, for example, one jurisdiction may not be able to rely on remedies obtained by another. Under such circumstances, it is understandable that each of two or more of the reviewing jurisdictions involved will have to impose its own remedy. For these reasons, this approach may be most useful, for example, when the proposed transaction involves a global relevant market or where the production assets, intellectual property, or research and development facilities located in one jurisdiction serve a broader region.<sup>104</sup>

Although work sharing is not necessarily appropriate in every case, the Advisory Committee believes that significant benefits could be obtained if these cooperative approaches at the remedies phase were employed more frequently. The Advisory Committee recognizes that initially these approaches may be feasible only with a limited number of jurisdictions, depending upon the relationship between the reviewing jurisdictions, the extent to which substantive convergence among the merger regimes of the reviewing jurisdictions has occurred, the extent to which one reviewing jurisdiction is legally capable of obtaining remedies for other jurisdictions, the types of relevant markets implicated, and the scope and nature of remedies required.

### *Work Sharing in the Review Stage*

In appropriate cases, it may be beneficial to limit the number of jurisdictions conducting independent second-stage reviews of a proposed transaction. Where the concerns of one country are likely to be the same as and subsumed by the concerns of a more distinctly affected investigating jurisdiction, it may be appropriate for the first country to refrain from independent investigation. For example, the merging parties might have enormous sales in one country but few sales in, say

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<sup>103</sup> In other words, if Jurisdiction A fears an anticompetitive impact in Product Market X but predicts no problem in Product Market Y, while Jurisdiction B is concerned about anticompetitive effects in Product Markets X and Y, could Jurisdiction A lawfully negotiate a remedy with the merging parties that addresses both Product Markets X and Y?

<sup>104</sup> Even when a market is worldwide, however, a transaction may have a somewhat different impact in different jurisdictions.



Bulgaria or Lithuania, and trade barriers may be low enough to prevent a price rise in those countries even if there would be no effect elsewhere.<sup>105</sup>

To minimize the number of agencies that proceed to second-stage review, cross-border consultation would need to be established before the expiration of the initial review period. To facilitate this cooperation, a broad waiver would be required from the parties at the initial filing stage. A key question to consider is whether the agencies are in a position to identify the issues that would enable other interested jurisdictions to determine whether the second-stage review of the proceeding agency would further explore issues about which those jurisdictions also had concerns.<sup>106</sup> The issues may not be sufficiently developed at this stage, however, and the agencies may lack sufficient time and resources.

In addition, such an arrangement may not be feasible in the current environment where the length of review periods are often statutorily mandated. The United States, the EU, and others operate under statutory deadlines when investigating mergers. A defined review period could preclude a jurisdiction from being able to negotiate its own remedies if it felt that the proceeding jurisdiction had not adequately addressed its concerns. At that point, the deadlines that prevent firms from consummating the merger may have passed and the firms' assets will be scrambled. Thus, jurisdictions may not be willing to rely on the review of another jurisdiction if they perceive a risk that consumers and important interests may not be adequately protected.<sup>107</sup> A sufficient level of convergence may therefore be necessary before this work sharing can be feasible in more than a handful of cases. In the meantime, this approach may be useful in situations in which there is no available remedy to the reviewing jurisdiction or there is a sufficient level of confidence in the reviewing jurisdiction.<sup>108</sup>

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<sup>105</sup> See Byowitz and Gotts Submission, at 14-17 (suggesting that those jurisdictions in which the impact is likely to be *de minimis* and the concerns are likely to be addressed by another jurisdiction should defer from independently investigating the transaction and await the decision of the reviewing jurisdiction).

<sup>106</sup> Commentators have suggested that when an agency opens a full or second-stage investigation, it should provide the merging parties and the other interested agencies with a brief statement of issues outlining the legal, economic, and factual matters on which its second-stage review would focus. See Rowley and Campbell Submission, at 38.

<sup>107</sup> For these reasons, positive comity provisions in the cooperation agreements to which the United States is a party do not apply to mergers or acquisitions.

<sup>108</sup> The ABA Special Committee in 1991 suggested a similar approach, endorsing application of a jurisdictional rule of reason approach or balancing of interests test for deciding whether to take enforcement action that affects a foreign party. The special committee suggested that the enforcement agency should ask which jurisdiction is appropriately equipped to fashion a remedy if one is felt to be required. The special committee recommended that when more than one jurisdiction has been notified of a merger, immediate consultation among those agencies should take place. A frank discussion of the relative interests involved and the location of assets ought to persuade all but the truly interested jurisdictions to defer. The remaining jurisdictions, if more than one, should consult throughout the course of the review to minimize conflicting or duplicative requirements on the parties; and at the end of the process use best efforts to avoid imposing a remedy that conflicts with the policy of the other state(s). ABA ANTITRUST SECTION 1991 SPECIAL

One way to safeguard against the possibility that the proceeding agency may reach a different result on the merits or a remedy different from the one the other jurisdictions might have reached, while at the same time gaining efficiency in the process and other potential benefits is to ensure sufficient participation in the process by the other jurisdictions. One jurisdiction could coordinate the investigation of a proposed transaction, take into account the views of each interested jurisdiction, and recommend remedies to address the concerns of all interested jurisdictions.

Under this advanced work-sharing arrangement, *the coordinating agency would perform a centralized information gathering function following initial notification by the merging parties to all reviewing agencies.* The coordinating agency would then assess the competitive effects of the proposed transaction in all relevant product and geographic markets. Each interested jurisdiction would be invited to submit comments to the coordinating jurisdiction regarding its particular concerns.<sup>109</sup> The assessment of the coordinating agency would be binding on the coordinating agency but could either serve as a recommendation to other interested jurisdictions (with a presumption in favor of accepting the recommendation) or be binding on those jurisdictions as well. This approach may prove useful in cases involving global markets. Its utility may be diminished, however, where relevant geographic markets are local rather than supranational and where market structure and competitive conditions vary greatly within such markets.

Work sharing logically could begin between the United States and the EU because of their record of cross-border cooperation and the amount of transatlantic merger activity that has its main impact in the United States and Europe. Further, working toward a common position with the EC should be a priority.<sup>110</sup> The Advisory Committee supports the initiative to form a working group with respect to multijurisdictional mergers, an idea that came out of the annual bilateral discussions with the EC in October 1999.<sup>111</sup>

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COMMITTEE REPORT, at 181-188.

<sup>109</sup> See, e.g., A. Neil Campbell and Michael J. Trebilcock, *International Merger Review: Problems of Multi-Jurisdictional Conflict*, in COMPETITION POLICY IN AN INTERDEPENDENT WORLD ECONOMY 129 (Erhard Kantzenbach et al. eds. 1993).

<sup>110</sup> The reasons why this step is important include the following: The EU is a source of both consolidation and proliferation of merger regimes. Several member states interpret domestic law consistent with EU law, and nonmember states often have looked to all aspects of EU competition policy, including merger regulation, as an attractive model for their own economies. Finding common ground with the EU thus holds the greatest promise of facilitating convergence among jurisdictions. ABA Antitrust Section Multijurisdictional Merger Review Submission, at 32-33.

<sup>111</sup> The working group is expected to consider lessons learned from cooperation with the EU over the last several years and cover a range of issues such as timing, mechanisms to facilitate information sharing, and the exchange of views with respect to enforcement theories and remedies. See "EU/US: Officials to Meet in Merger Control Group," EUROPEAN REPORT, Oct. 9, 1999 (reporting on remarks made by Assistant Attorney General Joel Klein and FTC Chairman Robert Pitofsky at the Brussels Press Conference following the U.S.-EC annual bilateral talks).



### *Potential for Advanced Work Sharing*

The Advisory Committee also considered whether, an even higher level of work sharing might be possible after more procedural and substantive convergence among merger review regimes has occurred. At this advanced level of work sharing, the coordinating agency would be required to accept the mantle of *parens patriae* for world competition. Accordingly, it would endeavor to evaluate procompetitive and anticompetitive effects of a proposed transaction on a global scale, taking into account all of the merger's costs and benefits to competition, not only the net effects within its borders. This approach arguably is superior to an approach in which each jurisdiction analyzes the effects of a proposed transaction within its own borders and ignores the harms or the benefits that the transaction may generate elsewhere.<sup>112</sup> Multimarket assessment would position the coordinating jurisdiction to account for what had previously been viewed as externalities, thereby enabling it to assess the net effects of the proposed transaction (under a neutral welfare standard) on a global scale. The coordinating jurisdiction could then design remedies to address the concerns of all interested jurisdictions.

In the United States, the Supreme Court's decision in *United States v. Philadelphia National Bank* ostensibly prohibits federal courts from balancing competitive effects in different product or geographic markets to determine whether a merger is lawful.<sup>113</sup> A footnote in the 1997 Revised Department of Justice and Federal Trade Commission Horizontal Merger Guidelines indicates that the federal antitrust agencies now may be willing to use their prosecutorial discretion to engage in multimarket balancing, albeit under highly circumscribed conditions.<sup>114</sup>

This advanced level of work sharing is a distant vision. At present, the Advisory Committee believes that while no agency should be obligated to take into consideration competitive harm or benefits that may be achieved outside the reviewing jurisdiction, competition authorities should consider that the transactions they review also have the potential to generate spillover effects in other jurisdictions. As the level of convergence in antitrust enforcement increases, however, agencies

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<sup>112</sup> See Christine Chambers Wilson, *Markets in the Balance: Efficiencies Analysis of Mergers Should Consider Multiple Markets*, LEGAL TIMES, Oct. 25, 1999, at 34.

<sup>113</sup> 374 U.S. 331 (1963).

<sup>114</sup> U.S. Dep't of Justice and Federal Trade Commission, Horizontal Merger Guidelines §4 n.36 (April 2, 1992), as amended April 8, 1997, reprinted at 4 Trade Reg. Rep. (CCH) ¶13,104. The 1997 Revised Horizontal Merger Guidelines acknowledge U.S. law's hostility to offset defenses, but note in a footnote that an agency "in its prosecutorial discretion will consider efficiencies not strictly in the relevant market, but so inextricably linked with it that a partial divestiture or other remedy could not feasibly eliminate" anticompetitive effects. Chairman Pitofsky observed that "[t]o date, none of the parties advocating a transaction has argued that overseas efficiencies are so compelling and so intertwined with consolidation in a domestic market that we should tolerate a significant anticompetitive effect at home. If that argument were advanced, we would consider it but our approach would be skeptical." Robert Pitofsky, Chairman, U.S. Federal Trade Commission, The Effect of Global Trade on United States Competition Law and Enforcement Policies, Remarks before Fordham Corporate Law Institute 26<sup>th</sup> Annual Conference on International Antitrust Law & Policy, at 17-18 (Oct. 15, 1999).



should consider the appropriateness of analyzing the benefits and anticompetitive effects of a proposed transaction on a global scale.

## **SUMMARY OF RECOMMENDATIONS**

### **Facilitate Greater Transparency**

1. Greater transparency in the application of each jurisdiction's merger review principles, practices, and procedures could be enhanced by the publication of guidelines and notices explaining the manner in which mergers will be analyzed, annual reports (including case examples), statements, speeches, and articles describing changes in relevant legislation, regulations and policy approaches, as well as case-specific decisions, releases, and press interviews.
2. At a multinational level, greater transparency may be achieved by conducting a survey and compiling an explanatory report of all jurisdictions with merger regulations to identify the principles they employ.
3. Each jurisdiction also should facilitate greater transparency by articulating clearly their rationales for challenging or refraining from challenging *significant* transactions (that is, decisions that set a precedent or otherwise indicate a shift in doctrine or policy).

### **Develop Disciplines for Merger Review**

1. Nations should apply their laws in a nondiscriminatory manner and without reference to firms' nationalities.
2. As a best practice or discipline, with limited exception (such as national security), noncompetition factors should not be applied in antitrust merger review. If a jurisdiction's law recognizes noncompetition factors (such as preservation of jobs, promotion of exports, international comparative advantage), such factors should be applied transparently and in a manner narrowly tailored to achieve their ends. Further, if a jurisdiction's merger regime explicitly permits noncompetition factors to trump traditional competition analysis, those noncompetition factors should be applied after the competition analysis has been completed.
3. Competition agencies do not operate in a political vacuum, enforcement agencies must still establish their independence, and "parochial" political concerns should not play a role in the merger review process.
4. Nations should recognize that the interests of competitors to the merging parties are not necessarily aligned with consumers' interests. Accordingly, authorities should minimize the

problems that may arise in competitor-driven processes, including the disruption of potentially procompetitive mergers.

5. When a transaction has a significant anticompetitive effect on the local economy in any given jurisdiction, the local antitrust authority has a legitimate interest in reviewing the transaction and imposing a remedy notwithstanding the fact that the transaction's "center of gravity" (whether determined by reference to the nationality of the parties, location of productive assets, or preponderance of sales) lies outside its national boundaries. At the same time, in the face of a clash, remedies with extraterritorial effects should be tailored to cure the domestic problem. Further, when fashioning a remedy with extraterritorial effects, the agency should be informed by foreign legal and other local practices.

<b>Continue to Enhance Cross-Border Cooperation</b>
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1. Cooperation among reviewing authorities can be enhanced if all jurisdictions establish a transparent legal framework for cooperation that contains appropriate safeguards to protect the privacy and fairness interests of private parties. In the U.S. context, a framework for cooperation might entail the development of a "Protocol" with a combination of key features: a description of how the federal antitrust enforcement agencies in the United States conduct cross-border coordinated merger investigations; model waivers permitting discussions otherwise prohibited by confidentiality laws and authorizing the exchange of statutorily protected information between competition authorities during a merger review; and a policy statement outlining safeguards established in a reviewing jurisdiction to protect confidential information. Other jurisdictions could usefully develop comparable protocols.
2. Agencies using confidentiality waivers should affirm in the policy statement the agency's intention to refuse to disclose information except to the extent it is legally required to do so, to use best efforts to resist disclosure to third parties (including the assertion of any privilege claims or disclosure exemptions that may apply), and to provide such notice as is practicable prior to disclosure to a third party of any confidential business information obtained pursuant to a waiver. The policy statement also should explain how concepts such as using best efforts to resist disclosure to third parties are implemented in the jurisdiction.
3. Jurisdictions also should consider adopting a policy to provide notice -- either before or after the fact -- with respect to documents shared with another jurisdiction. The Advisory Committee can well understand why an enforcement agency would be unwilling to agree to a blanket commitment to provide notice. However, when an agency has the authority to exchange information and adverse enforcement consequences are not present, then notice to the parties seems reasonable and proper. Alternatively, parties could provide select documents directly to other reviewing jurisdictions and waive confidentiality with respect to those documents or identify beforehand which documents or categories of documents may

and may not be shared, although in certain cases this may limit the benefits that potentially could be realized through the cooperative process.

<b>Develop Work-Sharing Arrangements</b>
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1. The most integrated approach the Advisory Committee envisions is work sharing, where the enforcement efforts of one agency may be sufficient to remedy the antitrust concerns of other jurisdictions. Work sharing may be accomplished in incremental steps with each step reflecting a different degree of cooperation and building upon successful approaches to cooperation and coordination that enforcement authorities have already implemented. An important objective is to reduce burdensome duplication, while preserving the right for the United States and other agencies to take their own measures, as necessary, if they believe the substantive analysis or remedies diverge from preferred approaches.
2. In a first step, each jurisdiction conducts its own review of the proposed transaction and participates in the formulation, if not the negotiation and implementation, of remedies. Such cooperation and coordination at the remedies phase has been successfully employed in a number of cases and the Advisory Committee believes that these approaches should be emulated in future cases whenever the legal and factual situations indicate that such coordination and cooperation will be useful.
3. In appropriate cases, it may be feasible to take cooperation to the next level and limit the number of jurisdictions conducting independent second-stage reviews of a proposed transaction. For example, where the concerns of Country A are likely to be the same as and subsumed by the concerns of a more distinctly affected investigating jurisdiction, it may be appropriate for Country A to refrain from independent investigation. At present, such an arrangement may not always be feasible in an environment with statutorily mandated review periods if the agency could lose the right to review the transaction at all. This approach likely would preclude a jurisdiction from being able to negotiate its own remedies if it felt that the proceeding jurisdiction did not adequately address its concerns or imposed a remedy that diverged from a preferred approach. Hence such impediments would have to be resolved if this degree of cooperation were to occur in more than a handful of cases. In the meantime, this approach may be useful in situations in which there is no available remedy to the reviewing jurisdiction or there is a sufficient level of confidence in the reviewing jurisdiction.
4. One way to safeguard against the possibility that the reviewing jurisdiction will reach a conclusion different from one another agency might have reached is to ensure sufficient participation in the process by the other jurisdictions. One jurisdiction would coordinate the investigation of a proposed transaction, take into account the views of each interested jurisdiction, and recommend remedies to address the concerns of all interested jurisdictions. The assessment of the coordinating agency would be binding on the coordinating agency but



either could serve as a recommendation to other interested jurisdictions (with a presumption in favor of accepting the coordinating jurisdiction's recommendation) or could be binding on those jurisdictions as well.

5. The Advisory Committee considered whether, given a sufficient amount of substantive and procedural convergence among merger review regimes, an even higher level of work sharing might be feasible someday. At this advanced level of work sharing, the coordinating agency would be required to accept the mantle of *parens patriae* for world competition. Accordingly, it would endeavor to evaluate procompetitive and anticompetitive effects of a proposed transaction on a global scale, taking into account all of the merger's costs and benefits to competition, not only the net effects within its borders. Multimarket assessment would position the coordinating jurisdiction to account for what had previously been viewed as externalities, thereby enabling it to assess the net effects of the proposed transaction (under a neutral welfare standard) on a global scale. The coordinating jurisdiction could then design remedies to address the concerns of all interested jurisdictions.

This advanced level of work sharing is a distant vision. At present, it is the view of this Advisory Committee that while no agency should be obligated to take into consideration competitive harm or benefits that may be achieved outside the reviewing jurisdiction, competition authorities should consider that the transactions they review also have the potential to generate spillover effects in other jurisdictions. As the level of convergence in antitrust enforcement increases, however, agencies should consider the appropriateness of analyzing the benefits and anticompetitive effects of a proposed transaction on a global scale.



## *Chapter 3*

# **MULTIJURISDICTIONAL MERGERS: RATIONALIZING THE MERGER REVIEW PROCESS THROUGH TARGETED REFORM**

The spread of merger control law has the potential to create significant benefits. Merger review regimes with advance notification requirements give competition authorities the ability to identify and remedy potentially problematic transactions, thereby benefiting consumers and competition. At the same time, the marked increase in the number of jurisdictions possessing merger review regimes renders it increasingly likely that international mergers and acquisitions will be reviewed by multiple jurisdictions.

While recognizing the benefits of merger review systems, the Advisory Committee also sees that significant and sometimes unnecessary transaction costs may be imposed on proposed transactions through the notification and review procedures implemented by various jurisdictions. These costs are of particular concern given that the vast majority of transactions reviewed by competition authorities are permitted to proceed with no action, suggesting that the transactions are either competitively benign or beneficial to society.

In considering the consequences of multijurisdictional merger review, the Advisory Committee has sought to identify those problematic practices employed by various jurisdictions around the world, as well as the exemplary practices that others could usefully adopt. The Advisory Committee believes that the challenges identified in this chapter can most profitably be addressed by advocating targeted reform in individual merger control regimes through the promotion of best practices. Broadly speaking, the best practices that the Advisory Committee identifies in this chapter fall within two major categories: ensuring that each jurisdiction's merger review regime examines only those mergers that have a nexus to and the potential to create appreciable anticompetitive effects within that jurisdiction; and ensuring that each jurisdiction refrains from unduly burdening those transactions during the course of the merger review process. The Advisory Committee believes that identifying the beneficial and troublesome practices of various jurisdictions provides useful comparisons and ultimately provides countries with the ability to select those practices that will enhance their merger review processes while comporting with national legal and cultural characteristics.

The United States by virtue of its experience and developed practices can and should play a leading role in the effort to implement reforms in the international arena. Perhaps one of the most effective ways in which the United States can stimulate global reform is through leading by example.



It is therefore important that the United States continue to examine and perfect its own merger review processes. After addressing problems within its own borders, the United States is well positioned to advocate that other jurisdictions make modifications in their merger review systems.

In the previous chapter the Advisory Committee considered ways to bridge the differences between systems and to minimize the risk that differing substantive standards employed by reviewing jurisdictions will lead to diverging evaluation on the merits, incompatible or burdensome remedies, and international friction. This chapter examines those problematic features within merger review systems that heighten uncertainty about filing obligations and review schedules and generate unnecessary transaction costs. It also identifies concrete ways in which the United States and other jurisdictions constructively may begin to address these international challenges. The chapter first explores in greater detail both the benefits and the challenges presented by the proliferation of merger control regimes with antitrust notification obligations. It then identifies specific practices that require reform, together with ways in which the Advisory Committee believes that these reforms may be implemented most effectively. Finally, the Advisory Committee identifies the likely impact of its recommendations in the United States.

### **Benefits of Antitrust Merger Notification**

While mergers frequently lead to significant cost savings and other benefits, they also may be anticompetitive. Merger review regimes give competition authorities the ability to identify and remedy potentially problematic transactions, thereby benefiting consumers and competition. The U.S. Department of Justice (DOJ) has estimated that its merger review efforts during 1998 saved consumers \$4 billion.<sup>1</sup> Although the Federal Trade Commission (FTC) does not track total estimated consumer savings flowing from its enforcement efforts, estimates in two specific actions are notable. The FTC estimates that it has saved consumers approximately \$250 million annually since it obtained a preliminary injunction to prevent two office supply superstores from merging in 1997. The agency also estimates that it has saved consumers another \$300 million annually by blocking two nearly simultaneously proposed mergers in the drug wholesaling industry in 1998.<sup>2</sup> Recognizing the benefits created by merger review systems, scores of jurisdictions around the world have enacted merger control laws within the last decade.

The more established national competition laws, as well as many of those more recently implemented, include substantive prohibitions on anticompetitive mergers, acquisitions, and joint ventures. Many of the laws require advance notice of proposed transactions. In fact, commentators have noted that “[i]t is not hyperbole that perhaps the greatest U.S. export in the last decade has been

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<sup>1</sup> Department of Justice, Antitrust Division, FY2000 Congressional Budget Submission, at 64.

<sup>2</sup> *FTC v. Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997); *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34 (D.D.C. 1998)(enjoining the merger of Cardinal Health Inc. with Brunswick Corp. and McKesson Corp. with Amerisource Health Corp.).

the adoption of pre-merger review processes, particularly in developing countries.”<sup>3</sup> Of the more than 80 jurisdictions currently possessing competition laws, it is estimated that at least 60 require (or provide for) antitrust merger notification.<sup>4</sup> This number undoubtedly will increase as other countries implement competition laws.

Advance notice is viewed as useful to competition authorities because it permits them to evaluate and either prohibit or restructure potentially anticompetitive transactions before the transaction is implemented. In this way, competition authorities avoid the widely acknowledged difficulties that accompany attempts to restore competition by “unscrambling the eggs” after allegedly anticompetitive transactions have been completed. The experience of the U.S. antitrust enforcement agencies before 1976 illustrates that imposing structural relief after a transaction has been consummated is often difficult, if not impossible. Attempting to prevent anticompetitive harm by relying on antitrust conduct cases after an anticompetitive merger has been implemented, according to the U.S. antitrust enforcement agencies, is a poor substitute for preserving competitive structure in the market in the first place. Even if postconsummation remedies were effective, consumers would suffer the harmful effects of the loss of competition during the interim period before remedies were imposed. Indeed, the stated purpose of the U.S. Congress in enacting the premerger notification regime embodied in the Hart-Scott-Rodino Act of 1976 (HSR Act or HSR) was to give the agencies “an effective mechanism to enjoin illegal mergers *before* they occur.”<sup>5</sup>

Reliance on premerger notification systems to provide advance notice of proposed transactions is based in large part on the recognition that competition authorities have neither the time nor the resources to monitor all business transactions in an attempt to identify those that pose a threat to competition. Nor do they have the ability to detect those “midnight mergers” that are consummated without public notice. Moreover, it is not practical to place the burden of notification on concerned competitors and consumers. Reliance on these entities to provide advance notice may prove imperfect either because these entities may not know about transactions before their consummation or because the transaction costs incurred by these entities in notifying the competition authorities may outweigh any benefits obtained by having the proposed transactions reviewed.

For these reasons, many jurisdictions view premerger notification regimes as the most efficient way of systematically obtaining advance notice of potentially anticompetitive transactions. Most competition law systems thus require merging parties to notify competition authorities of proposed transactions that meet certain criteria and to await the competition authorities’ review

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<sup>3</sup> Submission by Michael H. Byowitz and Ilene Knable Gotts, Wachtell, Lipton, Rosen & Katz, “Rationalizing International Pre-Merger Review,” ICPAC Hearings (Nov. 4, 1998), at 3 [hereinafter Byowitz and Gotts Submission].

<sup>4</sup> Most (approximately 50) merger control regimes provide for mandatory notification before closing, although some countries allow for postclosing or voluntary notification combined with the authority of the competition agency to intervene after consummation of the transaction. Annex 2-C identifies several antitrust merger notification systems.

<sup>5</sup> S. REP. NO. 94-803, at 72 (1976).



before consummating those transactions. Parties to a proposed transaction that meets the threshold filing requirements of the HSR Act, for example, must file a premerger notification form with the DOJ and FTC and observe a 30-day initial waiting period before consummating the proposed transaction. If either of the agencies requests additional information before the expiration of the initial waiting period, the parties must wait an additional 20 days after substantially complying with the request for additional information before going forward with the proposed transaction.<sup>6</sup>

So that competition authorities need not review each proposed transaction, premerger notification regimes require notification only for proposed transactions that meet certain criteria.<sup>7</sup> Because substantive merger control laws are concerned with structural restraints of competition, merger notification regimes in the first instance generally limit notification requirements to those transactions that result in the change of control by one or more entities over one or more other independent entities.<sup>8</sup> Most regimes also generally limit their scope by requiring notification only for those transactions deemed large enough to justify the expenditure of agency resources. In the United States, for example, parties to a merger need not notify the DOJ or FTC unless the statutory “size of party” and “size of transaction” tests are met.<sup>9</sup>

### **Challenges Presented by the Proliferation of Merger Regimes**

While the spread of merger control law has the potential to create significant benefits, the growing tendency of nations to apply their laws to offshore mergers and the sheer volume of law that firms undertaking mergers must now consider may be a mixed blessing. As a result of this explosion

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<sup>6</sup> 15 U.S.C. §18a(b)(1)(B) and (e); 16 C.F.R. §803.10(b)(1)-(2). In cash tender offers the initial waiting period is 15 days. In several other countries, such as Belgium, closings are not barred unless expressly ordered, but the parties may be limited from taking “irreversible” measures affecting operations in the jurisdiction.

<sup>7</sup> One commentator characterizes this feature of premerger notification regimes as the “filter” function. See Andre Fiebig, Esq., Gardner, Carton & Douglas, “The Limitations Imposed by International Law on the Extraterritorial Reach of Premerger Control Regimes,” (May 26, 1999), at 5, submitted by Mr. Fiebig for inclusion in the Advisory Committee record [hereinafter Fiebig Submission].

<sup>8</sup> Each jurisdiction has its own definition of when a transaction triggers the application of merger control law. Virtually all jurisdictions focus on a change in “control.” However, the boundaries of control often are blurred and vary greatly among jurisdictions. Merger control laws are presumptively triggered in a number of jurisdictions by monetary, stockholding or market share thresholds. For example, in Poland and Austria, acquisitions of 25 percent or more are considered mergers regardless of whether the minority shareholder may exercise control. Many antitrust regimes also incorporate a spectrum of control thresholds, where the lower control thresholds may be satisfied by relatively modest rights or abilities to influence (but not decisively influence) the management of a legal entity. For example, under EC jurisprudence, this spectrum ranges from “decisive influence” to “influence” to “no influence/passive investment.” See Barry E. Hawk and Henry L. Huser, “Controlling” the Shifting Sands: Minority Shareholdings Under EEC Competition Law, 17 FORDHAM INT’L L.J. 294 (B. Hawk ed., 1994).

<sup>9</sup> 15 U.S.C. §18a.



in merger regulation, merging parties face an array of up to 60 merger regimes that require, among other things:<sup>10</sup>

- Knowledge of and compliance with complex filing rules.
- Completion of an array of forms in accordance with various national requirements.
- Payment of substantial fees to the reviewing authorities (often designed to subsidize the operation of government agencies).
- Knowledge of and compliance with review schedules and waiting periods.

Although no comprehensive data are available that quantify the overall public and private costs imposed by compliance with multijurisdictional merger notification and review requirements, the responses of firms and their advisors to ICPAC outreach efforts suggest that these costs are sizeable.<sup>11</sup> According to those responses, one significant category of costs imposed on international mergers results from having to ascertain potential notification obligations in literally dozens of separate jurisdictions. Determining whether merger control regulations exist in all potentially affected jurisdictions is in itself a daunting task, as is determining whether the disparate jurisdictional thresholds for merger notification in these various countries are met. Many jurisdictions' filing requirements are vague, subjective, or difficult to interpret. Perhaps the biggest culprit in this category concerns notification thresholds based on market share tests, which currently are employed by many jurisdictions (though not the United States). Mistakes may be costly: several jurisdictions, including the United States and the European Commission (EC), impose fines for failure to notify a reportable transaction.<sup>12</sup>

A second significant category of costs results from having to file multiple merger notifications. Many of the forms used in various jurisdictions require the submission of extensive information about markets, competitors, customers and suppliers, and entry conditions in each of the markets in which the merging parties operates. This information is required even for transactions those pose few or no competition issues. In some cases, filings must be made in countries having

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<sup>10</sup> See Byowitz and Gotts Submission, at 3-5.

<sup>11</sup> See J. William Rowley, QC and A. Neil Campbell, *Multi-jurisdictional Merger Review -- Is It Time for A Common Form Filing Treaty?* in POLICY DIRECTIONS FOR GLOBAL MERGER REVIEW: A SPECIAL REPORT BY THE GLOBAL FORUM FOR COMPETITION AND TRADE POLICY, at 9 (1999), submitted by the authors for inclusion in the Advisory Committee record [hereinafter Rowley and Campbell Submission].

<sup>12</sup> Many other jurisdictions also impose fines for failure to comply with notification requirements; some of these are: Argentina (1 million pesos per day); Brazil (R\$55,000 to R\$5.5 million); Japan (up to Yen 2 million); Poland (1 percent of an undertaking's average monthly revenue); Taiwan (NT\$100,000 to NT\$1 million). Additional penalties may be imposed for closing without clearance. See *Getting the Deal Through: The International Regulation of Mergers and Joint Ventures*, GLOBAL COMPETITION REVIEW (2000).

no reasonable basis for exerting jurisdiction over a transaction. Numerous premerger notification regimes set reporting thresholds at exceedingly low levels or require notification of transactions that lack any appreciable nexus to the economy of the reviewing jurisdictions. Precise statistics regarding the percentage of proposed transactions that ultimately are reviewed by multiple jurisdictions are not available. Anecdotal evidence collected by the Advisory Committee indicates, however, that it is not unheard of for merging parties to file notifications with a dozen or more jurisdictions.<sup>13</sup>

Direct costs of compliance include attorneys' fees, filing fees, and document production costs. Companies frequently must retain local counsel in a multiplicity of jurisdictions to obtain guidance on whether the proposed transaction is subject to notification requirements and on how to comply with premerger filing requirements, a task complicated by the fact that, in many jurisdictions, few attorneys may be experienced in competition law. As one submission to ICPAC observed, "local counsel must be retained to guide the parties through the complexities of the individual antitrust regimes and obtain the approval of the local antitrust authorities. Often the laws in a particular jurisdiction, including their standards for filing, are ambiguous, or the forms that must be submitted to the reviewing authorities are complex and call for detailed local information, requiring the active intervention of local counsel."<sup>14</sup>

Annex 3-A identifies the filing fees imposed by several jurisdictions and shows how quickly they mount when multiple jurisdictions are involved. The United States, for example, requires each acquiring party to pay a US\$45,000 filing fee; filing fees in the United States totaled \$195 million in fiscal year 1999.<sup>15</sup> Similarly, Canada in November 1997 introduced a filing fee of Cdn\$25,000 for each prenotifiable transaction and request for an Advance Ruling Certificate.<sup>16</sup> Although filing fees may account for only a tiny fraction of the total cost of a large transaction, multiple filing fees may impose relatively significant costs on smaller transactions.

Multijurisdictional merger review also imposes indirect and difficult-to-quantify costs that may exceed the direct costs identified above. These indirect costs include, for example, the drain on executives' time and productivity. One observer notes that:

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<sup>13</sup> See, e.g., Submission by the U.S. Council for International Business, ICPAC Hearings (Apr. 22, 1999), at 4 [hereinafter USCIB Submission] ("Presently, it is not unheard of that a multinational corporation with a proposed merger would be required to file in 20 or 30 jurisdictions.").

<sup>14</sup> James B. Kobak, Jr., and Anthony M. D'Iorio, Hughes Hubbard & Reed LLP, *The High Cost of Cross-Border Merger Reviews* in *THE GLOBAL ECONOMY AT THE TURN OF THE CENTURY*, VOL. III INTERNATIONAL TRADE, at 717, 720 (Gulser Meric and Susan E.W. Nichols eds. 1998) submitted by Mr. Kobak for inclusion in the Advisory Committee record [hereinafter Kobak Submission].

<sup>15</sup> U.S. DOJ Premerger Office.

<sup>16</sup> Competition Bureau Fee Charging Policy, CANADA GAZETTE, PART I, VOL. 131, NO. 44, at 3,446 (Nov. 1, 1997).



Executives' time and productivity lost due to a protracted investigation (or series of investigations) takes a heavy toll on the parties to the transaction. In each jurisdiction where some form of compliance is required, senior officers of the companies involved will have to spend many hours conducting, coordinating, and supervising the search for financial and market information that will have to be produced to each of the regulating authorities involved. The senior officers will also likely have to make themselves available to counsel and to the authorities for interviews and other information gathering activities, which distract the senior officers from the business of the firm.<sup>17</sup>

The same observer notes that the "loss to the company of the executives' time and productivity will compound with each follow up request propounded by the regulating authorities."<sup>18</sup>

Other intangible costs arise from the delays that may be engendered by the review process in a number of jurisdictions. Delays imposed on proposed transactions result from the lack of strict deadlines and lengthy review periods. At the extreme, the merging parties may abandon the transaction. Mergers are almost always time sensitive; delays may prove fatal to a transaction, particularly if it relates to a high-technology industry, such as electronics, computers, or software, with a very short life cycle. In addition, delay breeds uncertainty in product, labor, and capital markets, enabling competitors to raid customers and staff.<sup>19</sup>

Delays also create lost opportunity costs. For example, "[d]uring the time that deals are delayed, the parties to a transaction lose the savings, efficiencies and synergies (assuming there are any) that induced their respective business decisions to do the deal in the first place, and the economy is denied whatever competitive benefits would result."<sup>20</sup> One ICPAC hearing participant testified that he is aware of a merger where the annual efficiencies exceed a billion dollars. "This

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<sup>17</sup> Kobak Submission, at 721-22. The parties to the Halliburton/Dresser transaction estimate that they spent approximately \$3.5 million to comply with notification and investigation requirements in the six jurisdictions where notification was required (Australia, Brazil, Canada, the EU, Mexico, and the United States). In addition, company officials spent a great amount of time compiling requested data and preparing for and undergoing formal depositions. The United States deposed 12 executives, and informal interviews were conducted with a few key executives by the authorities in Mexico and the EU. The EU also conducted a site visit. Submission by Lester L. Coleman, Executive Vice President and General Counsel, in response to Advisory Committee Multijurisdictional Merger Review Case Study questionnaire regarding the Halliburton/Dresser transaction (March 9, 1999) [hereinafter Coleman Submission].

<sup>18</sup> Kobak Submission, at 722.

<sup>19</sup> Submission of Barry Hawk, Skadden, Arps, Slate, Meagher & Flom, "Reforming Merger Control to Reduce Transaction Costs," ICPAC Hearings (Nov. 3, 1998), at 12-13 [hereinafter Hawk Submission].

<sup>20</sup> Joe Sims and Deborah P. Herman, *The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice: A Case Study in the Law of Unintended Consequences Applied to Antitrust Legislation*, 65 ANTITRUST L.J. 865, 885-86 (1997).



particular merger will take at least a year to clear, and that's one merger out of a world of mergers."<sup>21</sup> Other opportunity costs may include the inability of the individual parties to accept business that the merged entity would have been well positioned to accept because of the anticipated synergies realized from combining their operations.

Despite these escalating costs, the Advisory Committee was presented with no evidence suggesting that transaction costs associated with multijurisdictional merger review have slowed the pace of the global economy.<sup>22</sup> However, some ICPAC hearing participants cautioned that as more and more countries adopt competition laws, transaction costs incurred by global firms tend to increase, creating the danger that those costs could "cancel out the efficiency gains that one would expect from the globalization process."<sup>23</sup>

### **Rationalizing the Merger Review Process in Light of Globalization**

After looking at the transaction costs that result from multijurisdictional merger review, the Advisory Committee considered whether they are merely costs of doing business in multiple jurisdictions or whether they are excessive and could be minimized while still ensuring that enforcers have the tools necessary to identify and remedy anticompetitive transactions. *In the Advisory Committee's view, many of the transaction costs imposed by merger regimes are rationally related to the efficient review of transactions that have the potential to create appreciable anticompetitive*

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<sup>21</sup> Testimony of J. William Rowley, McMillan Binch, ICPAC Hearings (Nov. 3, 1998), at 145. A company representative estimated that clearing antitrust regulatory hurdles in eight jurisdictions cost British Telecommunications PLC an estimated \$100 million in lost efficiencies during each month that the British Telecommunications/MCI Telecommunications Corp. transaction could not be closed. Statement of Tim Cowen, BT Group Legal Services, at the Fordham Corporate Law Institute (Oct. 22 & 23, 1998).

<sup>22</sup> Hawk Submission, at 14. *But see* Presentation by Members of the International Antitrust Law Committee of the Section of International Law and Practice, ICPAC Hearings (April 22, 1999), at 4 [hereinafter Members of ABA Int'l Antitrust L. Comm. Submission](contending that the U.S. merger review system imposes substantial costs both in money and management time, and therefore can and does chill some foreign transactions and cause the structuring of others to exclude U.S. operations). Of course, some deals may exclude U.S. operations because of potential antitrust concerns and vigorous U.S. enforcement.

<sup>23</sup> Statement of Frédéric Jenny, Vice President, Conseil de la Concurrence, ICPAC Hearings (Nov. 2, 1998), at 58; *see also* Testimony of Luis de Guindos Jurado, Director General de Política Económica y Defensa de la Competencia, ICPAC Hearings (Nov. 2, 1998), at 100 ("mega-mergers must be regarded as a logical consequence of a whole range of factors, and, importantly, as a symptom of market dynamism in pursuit of ever greater efficiency. Of course, the competition authorities must be alert to the possible creation or enforcement of dominant positions as a result of such operations, and cooperation between competition authorities must be welcomed as a useful and necessary means to this end. Nevertheless, we must also take care to avoid any kind of intervention that could deter market dynamism or prevent firms from improving their economic efficiency. Otherwise, there is a very real risk that we as competition authorities could actually impair economic growth and damage consumer welfare."); *see also* Byowitz and Gotts Submission, at 3 ("continued globalization through mergers and acquisitions should not be discouraged or inappropriately taxed by national competition review processes. Instead, the merger wave should be encouraged, and the international merger review process simplified and rationalized").

*effects within the reviewing jurisdiction and therefore should be taken in stride by companies as a cost of doing business.* At the same time, the Advisory Committee is of the view that while antitrust merger control regimes have the potential to create benefits for society, those same notification and review processes also impose significant transaction costs on international transactions. It is therefore important to focus on those *unnecessary* and *burdensome* costs that have little or no relationship to antitrust enforcement goals.

These costs are of particular concern when it is recognized that the majority of the transactions that are reviewed by competition authorities are permitted to proceed with no enforcement action, suggesting that those transactions are efficiency enhancing or competitively benign. Indeed, statistics for several jurisdictions, including the United States, indicate that only a small percentage (generally ranging from 1 to 5 percent) of all notified mergers ultimately are either prohibited or restructured by competition authorities (Box 3-A). This evidence leads the Advisory Committee to conclude that the growing incidence of multijurisdictional merger reviews is imposing unnecessary transaction costs in a large number of transactions that present little, if any, actual competitive concern.

### **Box 3-A: Merger Challenge Rate**

**Australia:** In 1997-98 the Australian Competition and Consumer Commission considered 176 mergers and joint ventures of which it objected only to 8 (5 percent). Australian Competition & Consumer Commission Annual Report 1997-98.

**Brazil:** From June of 1998 to September of 1998, only 2 of the 48 notified transactions (4 percent) were not approved outright. From May of 1996 to May of 1998, all but 17 of the 104 notified transactions were approved without any condition. Cade.

**Canada:** During the fiscal year ending March 31, 1999, the Canadian Competition Bureau received notification of 192 transactions (an additional 222 requests were made for advance ruling certificates). Of the examinations concluded during the year, all but 5 were approved outright. Annual Report of the Commissioner of Competition (1999).

**European Commission:** According to the EC, only 14 transactions out of 292 notifications (less than 5 percent) in 1999 were challenged or subjected to a second-phase investigation. In response to concerns expressed by the European Commission, an additional 19 transactions (approximately 6.5 percent) were cleared subject to undertakings accepted during the first phase of investigation.

**Japan:** In 1998, no formal measures were taken against the 3,813 notified mergers and acquisitions, although at least two transactions (less than 1 percent) were revised in response to concerns raised during prenotification consultation (others may have been abandoned or revised during prenotification consultation). Annual Report on Competition Policy in Japan. Notably, the thresholds were revised effective January 1, 1999, and are expected to capture approximately 200 transactions annually.

**Taiwan:** Of the 1,045 notified cases that were concluded in 1999, all but 13 (less than 2 percent) were approved. Taiwan Fair Trade Statistics.

**United Kingdom:** The Office of Fair Trading in the United Kingdom examined 425 transactions in 1998, of which only 8 (less than 2 percent) were referred to the Monopolies and Mergers Commission (MMC) for further investigation. Undertakings were accepted in an additional three (less than 1 percent) in lieu of a reference to the MMC (others may have been abandoned in response to confidential guidance). Director General's Annual Report to the DTI.

**United States:** Of the 4,679 transactions notified during the fiscal year ending September 30, 1999, requests for additional information were issued in 113 (2.4 percent), and only 76 transactions (1.6 percent) resulted in enforcement actions. U.S. DOJ Premerger Office.



To preserve the benefits of merger review while easing unnecessary burdens on international transactions, the Advisory Committee concludes that in the first instance each jurisdiction should take steps to ensure that it casts its merger review “net” only as broadly as necessary to identify potentially problematic transactions. Once a transaction has come under the merger review net of a particular jurisdiction, moreover, the Advisory Committee concludes that jurisdictions should ensure that unnecessary burdens are not imposed on that transaction.

To achieve these goals, the Advisory Committee recommends several “best practices” designed to rationalize the application of merger review procedures.<sup>24</sup> Having considered problematic practices in various jurisdictions around the world, the Advisory Committee recommends the following approaches to remedy those ills, which are discussed later in this chapter:

- In designing their merger review systems, jurisdictions should seek to review only those transactions that have a nexus to and that pose the threat of appreciable anticompetitive effects within the reviewing jurisdiction. To this end, threshold filing requirements should be designed to screen out mergers that lack a nexus to the reviewing jurisdiction. In addition, notification thresholds should be set at levels designed to screen out transactions unlikely to generate appreciable anticompetitive effects within the jurisdiction. Additional steps that can be taken to eliminate unnecessary burdens on merging parties during this stage include establishing objectively based notification thresholds and ensuring their transparency.
- Once a proposed transaction falls within the merger review system of a given jurisdiction, that jurisdiction should avoid imposing unnecessary costs on the transaction. To this end, premerger notification and review should occur within a two-stage process designed to enable enforcement agencies to identify and focus on transactions that raise competitive issues while allowing those that present none to proceed expeditiously.

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<sup>24</sup> Advisory Committee Member Eleanor M. Fox suggests another approach to facilitate efficient coordination of filings and reduce the burden on parties of multiple notifications. She proposes a common clearinghouse for premerger notification by firms that elect to opt into such a system. One way to achieve this would be to permit the merging parties to file with a disinterested clearinghouse center on the day of the first filing. Alternatively, if the first filing is in a mature antitrust jurisdiction and covers international markets where all or most of the impacts would occur, all interested nations would be bound to accept the first filing as their first and basic information about the merger. The notified center or jurisdiction would announce the filing to member nations (or to interested or potentially interested nations). The recipient agencies would be bound to use the information only for merger review. Any country receiving the announcement that believes its system requires notification of the transaction could request a copy of the notification. A copy of this request would go to the merging parties who could contest the jurisdiction of a requesting country before the filing is sent to that country.

Although other members found merit in the proposal, it was noted that a number of issues needed to be resolved. For example, sufficient information would have to be produced in the initial filing to enable all potentially affected jurisdictions to determine whether a notification obligation is triggered and whether a jurisdiction has an enforcement interest in the transaction. It was noted that this business information is confidential and is not in the public domain. A clearinghouse system would require the broad dissemination of this confidential information to jurisdictions with varying degrees and capabilities of assuring adequate protection.

- This goal can be accomplished by adopting reasonable deadlines and time frames for review. Jurisdictions should strive to clear nonproblematic transactions within a 30-day or one-month time frame following notification. In addition, jurisdictions should seek to rationalize review periods by harmonizing rules pertaining to when premerger filings can (or must) be made. Finally, merger review periods should not be open ended and more deadlines should be employed during second-stage review processes so as to provide greater certainty to the merging parties.
- To ensure that transactions that trigger notification obligations are not faced with excessive information requirements, while at the same time ensuring that competition authorities have sufficient information to identify competitively sensitive transactions, the initial notification should require the minimum amount of information necessary to make a preliminary determination of whether a transaction raises competition issues sufficient to warrant further review. Mechanisms also should be established to narrow the legal and factual issues presented by each proposed transaction early in the merger review process.

The Advisory Committee believes that these recommendations represent realistic goals that can reduce costs on international transactions without reducing the efficacy of the enforcement agencies. The Advisory Committee believes it is in the interest of the United States and other jurisdictions to examine their own merger review processes and undertake reform efforts, where necessary, targeted at minimizing the burdens associated with merger review. In particular, one additional area warranting consideration is overlapping decisionmaking power for competition policy within jurisdictions. This feature of merger review systems may hinder the ability of national governments to establish common policies and procedures within their own borders, and as a result, with their foreign counterparts.

#### **TARGETED REFORM: CASTING THE MERGER REVIEW NET APPROPRIATELY**

Various jurisdictions that rely on exceedingly low notification thresholds or that require a filing in the absence of any appreciable domestic effects impose significant costs on transactions that are unlikely to generate appreciable anticompetitive effects within the reviewing jurisdictions.<sup>25</sup>

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<sup>25</sup> In addition to imposing unnecessary transaction costs on proposed transactions premerger notification regimes that rely on thresholds of this nature may violate customary principles of international law. The Advisory Committee requested input from the private bar on whether the extraterritorial extension of jurisdiction in these cases potentially infringes international law. This input suggests that international law requires a nexus between the state and the act, person, or property being regulated. In the context of economic regulation, a significant detrimental effect (on competition, for example) within a state generally will justify the extraterritorial extension of jurisdiction by that state. Because the exercise of jurisdiction in these instances may interfere with the sovereignty of other states, however, the international law principle of proportionality requires that the regulation be necessary to achieve the legitimate goal of the law and further be restricted to means which are least likely to interfere with the sovereignty of other states. *See* Fiebig Submission. As described later, using notification thresholds that require an appreciable (and objectively based)



Thus, international transactions are burdened, but concomitant benefits are not necessarily created. To complicate matters, many jurisdictions' filing requirements are vague, subjective, or difficult to interpret.

### **Using Notification Thresholds to Screen Out Mergers That Are Unlikely to Have Appreciable Anticompetitive Effects Within the Reviewing Jurisdiction**

Several best practices can be employed to rationalize threshold tests for notification to reduce unnecessary transaction costs without significantly reducing the public benefit created by advance notification. First, in establishing its premerger notification thresholds, each jurisdiction should seek to screen out mergers that are unlikely to generate appreciable anticompetitive effects within the reviewing jurisdiction. This goal can be accomplished by implementing threshold tests that include an appreciable nexus to the economy of the jurisdiction, such as transaction-related sales or assets in the jurisdiction, and that are set at only as broad as necessary to require the reporting of transactions that may have the potential to cause appreciable anticompetitive effects within the jurisdiction. These thresholds also should be objectively based and transparent.

Because notification thresholds are established by statute in many jurisdictions, revisions would require legislative action. Thus, it is recognized that the proposed reforms pertaining to notification thresholds likely cannot be accomplished in the short run. In the meantime, jurisdictions should ensure that transparency exists, with respect to their merger regimes generally, but should focus particularly on clarifying the manner in which those thresholds should be applied and providing information on how to comply with premerger filing requirements.

#### *Nexus to the Jurisdiction*

*The Advisory Committee recognizes that transactions between firms with international operations can create anticompetitive effects in multiple countries. Thus, the Advisory Committee acknowledges that the reporting of foreign and domestic transactions is necessary and appropriate so long as those transactions possess an appreciable nexus to the reviewing jurisdictions.* However, numerous jurisdictions require notification of transactions in the absence of any appreciable domestic effect. In delineating their sphere of application, few (if any) premerger notification regimes rely expressly on the potential for proposed transactions to create anticompetitive effects. Rather, most jurisdictions rely on surrogate criteria such as sales volume, asset values, or market shares to determine the reach of their premerger notification regimes. Reliance on surrogate criteria is understandable, given the subjectivity that necessarily is involved in determining whether a proposed transaction poses harm to competition and therefore whether a premerger notification filing is required. The use of these proxies may be problematic, however, when they are not tailored to

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nexus to the economy of the reviewing jurisdiction would encroach less on the sovereignty of the states where the parties are located and reduce uncertainty surrounding the level of local contacts necessary to trigger a notification obligation. This suggests that reliance on worldwide figures or potential effects in themselves is not a sufficient basis of jurisdiction under principles of international law for a state to compel compliance with the premerger control regime.



identify transactions that may cause appreciable anticompetitive effects within a given jurisdiction.

Specifically, several jurisdictions premise their notification threshold tests on worldwide figures, including worldwide sales volumes or worldwide asset values. Reliance by a premerger notification regime on thresholds of this nature creates the possibility that a transaction with no reasonable likelihood of generating any effect within a jurisdiction still may be required to make a premerger filing in that jurisdiction. This possibility exists even if the premerger notification regime requires that a certain volume of sales be made in the territory of that country.

One example of this problematic practice can be found in the “effects test” employed by some jurisdictions, under which any transaction with the potential to generate effects within a jurisdiction may be subject to premerger notification requirements in that jurisdiction. For example, before the implementation of amendments that became effective on January 1, 1999, Germany required premerger notification if a transaction involved one party with annual worldwide sales of more than DM2 billion (approximately \$1.06 billion), or two or more parties with annual worldwide sales of more than DM1 billion (approximately \$530 million), whenever the transaction had any potential effect in Germany.<sup>26</sup>

Under the new German law, notification is not required unless the proposed transaction satisfies requirements with respect to both worldwide and German sales figures. The addition of the German turnover threshold makes it more likely that transactions captured within the merger review regime will have at least some nexus to Germany; the problem is not entirely eliminated, however, because transactions may still be notifiable notwithstanding the fact that one party has no (or *de minimis*) sales in Germany.<sup>27</sup> A number of other jurisdictions still employ variants of the effects test

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<sup>26</sup> Similar rules applied under the Austrian merger statute until the Austrian Supreme Court ruled that Austrian turnover is to be considered. Submission by the American Bar Association Section of Antitrust Law, “Report on Multijurisdictional Merger Review Issues,” ICPAC Hearings (May 17, 1999), at 7-9 [hereinafter ABA Antitrust Section Multijurisdictional Merger Review Submission].

<sup>27</sup> Specifically, a premerger notification filing is required if the merging parties’ aggregate worldwide turnover exceeds DM1 billion (approximately \$530 million) and at least one of the parties has sales in Germany of more than DM50 million (approximately \$26.5 million)(conversion rates as of June 1999). The German FCO issued a notice interpreting the term “domestic effects,” which provides guidance to merging parties. However, uncertainty remains, and a filing still may be triggered in cases where the target has no sales in Germany. For example, the notice provides that domestic effects are assumed to be present if it is *likely* that goods will be supplied to Germany as a result of the merger, the merger will enhance the know-how of a participant undertaking that operates in Germany, industrial property rights will accrue or the financial strength of the participating undertaking that operates in Germany will be strengthened. See notice at <[http://www.bundeskartellamt.de/merkblatt\\_inlandsauswirkung\\_.html](http://www.bundeskartellamt.de/merkblatt_inlandsauswirkung_.html)>.

to assert jurisdiction and impose premerger notification requirements.<sup>28</sup> Box 3-A identifies several jurisdictions that rely on worldwide figures to assert jurisdiction over proposed transactions.<sup>29</sup>

In addition to capturing transactions with no reasonable likelihood of anticompetitive effects, thresholds based on worldwide figures generate significant uncertainty about when contacts in a foreign jurisdiction (particularly in Eastern European jurisdictions) rise to the level of “domestic effects” triggering application of a jurisdiction’s merger control law.<sup>30</sup> Even local counsel remain uncertain as to how to interpret domestic effects in some jurisdictions.<sup>31</sup> Input received from the legal community is that antitrust notifications may be made merely out of an abundance of caution in jurisdictions where arguably there are no (or *de minimis*) local effects.

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<sup>28</sup> See ABA Antitrust Section Multijurisdictional Merger Review Submission, at 8-9; Testimony of Stephen D. Bolerjack, Counsel, Antitrust and Trade Regulation, Ford Motor Company, on behalf of the National Association of Manufacturers, ICPAC Hearings (Apr. 22, 1999), at 2-3 [hereinafter NAM Submission]. In addition, the European Commission asserts jurisdiction under the EC Merger Regulation (ECMR) whether or not a transaction will have an effect on trade in the EU. See Jonathan Faull, Director, Directorate General for Competition (DG IV), European Commission, International Antitrust Takes Flight: a Review of the Jurisdictional and Substantive Law Conflicts in the Boeing/McDonnell Douglas Merger, Outline of remarks before the American Bar Ass’n Int’l Antitrust Committee Spring 1998 Meeting (Apr. 2, 1998), at 8. In his remarks, Director Faull questions whether insistence on notification under the ECMR of a transaction that meets the thresholds but lacks sufficient connection with the EU is contrary to international law.

<sup>29</sup> This list does not purport to be comprehensive nor does it identify those jurisdictions, such as Germany and the EU, where unrelated local sales (of the acquiring parties, for example) are sufficient to trigger a notification obligation. The information contained on this list and other lists or descriptions throughout the chapter regarding the rules and regulations in the various jurisdictions with merger control are based on available information; to determine notification obligations and filing rules and procedures, local counsel should be consulted rather than relying on the summary descriptions contained herein.

<sup>30</sup> See e.g., Submission by Lawrence W. Keeshan, PricewaterhouseCoopers LLP, General Counsel, in response to Advisory Committee Multijurisdictional Merger Review Case Study questionnaire re the Pricewaterhouse/Coopers transaction, at 6-7 (Aug. 20, 1999) [hereinafter Keeshan Submission re the Pricewaterhouse/Coopers transaction] (determining whether notification would be required in any Eastern European country was generally very difficult based in part on the lack of any applicable precedents to determine the scope of the government’s premerger authority under comparatively new regulatory regimes); USCIB Submission, at 5 (“businesses that need to file in multiple jurisdictions find it difficult and frustrating to locate reliable information regarding how and when to file in each jurisdiction”).

<sup>31</sup> Advice of local counsel -- both on the interpretation of newly promulgated laws and regulations and on the proper application of existing laws and regulations -- may be inconsistent from transaction to transaction. Attempting to seek guidance from local competition authorities poses risk, as well. Officials may take months to respond to inquiries, for example. In addition, competition authorities seeking to increase their authority may be reluctant to advise that no filing is required. In some jurisdictions, the staff may not be well trained or well paid, or may receive additional compensation based on the number of filings made. For example, in Romania a government decision established a fund into which a portion of the taxes collected from notifications and other activities under the competition law are contributed and from which employees from the antitrust authority are awarded bonuses. This system creates incentives for officials to take the position that a merger should be notified to and approved by the antitrust authority for reasons unrelated to proper application of the competition law.

To eliminate unnecessary filings, notification should not be required in any jurisdiction based solely on potential domestic effects or local business activity unless such effects or activity exceeds some appreciable standard as measured, for example, by reference to the target's local activities, such as local sales or assets.<sup>32</sup> The Advisory Committee therefore recommends that the international community advocate that each jurisdiction review its notification thresholds to ensure that they incorporate an appreciable and objectively based nexus to the economy of the jurisdiction. This would screen out many transactions where there are no appreciable competitive effects in the jurisdiction and minimize uncertainty regarding the level of local contacts necessary to trigger a notification obligation, especially as to "foreign-to-foreign" transactions.

In revising notification thresholds, jurisdictions can look to those premerger notification regimes that are designed to identify only transactions with an appreciable nexus to the jurisdiction. Positive examples in this regard include:

- Canada (to trigger a notification obligation the target company must carry on an operating business in Canada coupled with Canadian assets/sales tests);
- Sweden (statute as interpreted by the Swedish authority requires an "acquisition of a Swedish business" with *non de minimis* sales and a Swedish subsidiary, affiliate, employees or sales organization); and
- the United States (foreign transaction exemptions based on U.S. assets and/or sales of target).<sup>33</sup>

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<sup>32</sup> Perhaps the most obvious effective alternative (or supplement) to sales volumes as a criterion for delineating the scope of a premerger notification regime is reliance on market shares. However, as described later, market share tests are even more troublesome because of their inherent subjectivity and the uncertainty they generate.

<sup>33</sup> ABA Antitrust Section Multijurisdictional Merger Review Submission, at 9.



**Box 3-B: Notification Obligations Triggered by Worldwide Sales and/or Asset Values**

<b>Albania</b>	Notification obligation triggered if the assets of one of the parties exceed Leks 50 million (approximately \$363,958) or the combined firms' assets exceed Leks 200 million (approximately \$1.5 million).
<b>Argentina</b>	Notification obligation triggered if the parties' combined worldwide turnover exceeds Arg. Pesos 2.5 billion (approximately \$2.5 billion).
<b>Brazil</b>	Notification obligation triggered if any of the parties has total worldwide sales exceeding R\$400 million (approximately \$222.4 million).
<b>Croatia</b>	Notification obligation triggered by combined worldwide turnover of 700 million Kuna (approximately \$98.3 million) or two or more parties have worldwide turnover of 90 million Kuna (approximately \$12.6 million).
<b>Estonia</b>	Notification obligation triggered by combined worldwide turnover of 100 million Kroons (approximately \$6.81million).
<b>Ireland</b>	Notification required in any transaction involving two or more parties with worldwide assets of at least IR£10 million (approximately \$13.5 million) or worldwide turnover of at least IR£ 20 million (approximately \$27.06 million) whenever either party carries on business in Ireland.
<b>Lithuania</b>	Notification obligation triggered by combined turnover in excess of LTL 30 million (approximately \$7.5 million) and two or more parties with turnover in excess of LTL 5 million (approximately \$1.25 million).
<b>Poland</b>	Notification obligation triggered by combined worldwide turnover of ECU 25 million (approximately \$26.64 million) or worldwide value of the assets acquired of ECU 5 million (approximately \$5.33 million).
<b>Romania</b>	Notification obligation triggered by combined worldwide turnover of ROL 25 billion (approximately \$1.6 million).
<b>Slovakia</b>	Notification obligation triggered by combined worldwide turnover of at least 300 million Slovak crowns (approximately \$7.25 million) and at least 2 of the parties each have worldwide turnover of 100 million Slovak crowns (approximately \$2.4 million).
<b>S. Korea</b>	Notification obligation triggered if parties' combined worldwide turnover or asset value exceeds Korean won 100 billion (approximately \$84.1 million).

Conversion rates are year end average 1999. This list does not include alternative threshold tests. For example, in Brazil if none of the parties have worldwide sales exceeding R\$400 million, a notification obligation still may be triggered if the parties meet the alternative market share test.

*Appreciable Anticompetitive Effects within the Reviewing Jurisdiction*

Numerous premerger notification regimes also cast their merger review nets overbroadly by relying on exceedingly low notification thresholds. As data shown in Box 3-A suggests, the vast majority of mergers reviewed under merger notification regimes are found not to offend the law. The few mergers that are either prohibited or restructured indicate that the establishment of low notification thresholds results in capturing in the merger review net many more transactions than necessary to achieve merger review objectives.

A number of jurisdictions recently have enacted laws with thresholds so low that acquisitions unlikely to have any appreciable effect on competition still must be notified. In other countries with longstanding laws, this problem may be the result of a failure to adjust notification thresholds to reflect the effects of inflation or increases in the value of companies as measured by stock market valuation. In fact, jurisdictions generally do not index their premerger notification thresholds to inflation rates or stock market indices. Italy is one of the few jurisdictions that does increase its thresholds annually to account for inflation. In countries that do not employ indexing measures, an ever-increasing proportion of mergers becomes reportable.<sup>34</sup>

In the United States, for example, premerger notification thresholds have not been adjusted since enactment of the HSR Act in 1976. Data provided by business groups and the private bar indicate that since 1976, stock market valuations of companies and their assets have increased dramatically; because the reporting thresholds have remained unchanged, an increasing proportion of transactions come under the merger review net. For 1997, the filing thresholds captured transactions that would be valued, in constant 1976 dollars, at approximately \$5 million between parties with total sales and assets of approximately \$35 million and \$3.5 million, respectively. If the filing thresholds had simply kept pace with inflation, the number of filings in 1998 would have equaled their 1990 level, eliminating the nearly 134 percent increase in filings since 1990.<sup>35</sup>

Nor has Canada adjusted its notification thresholds for inflation since the country adopted its modern merger review system in 1986. Using the Consumer Price Index as of May 1998 to adjust the thresholds would increase the Cdn\$400 million party-size and Cdn\$35 million target-size thresholds to almost Cdn\$560 million and Cdn\$50 million, respectively. Canadian counsel point

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<sup>34</sup> See Rowley and Campbell Submission, at 15-16. A survey conducted by Rowley and Campbell reports that the most antitrust merger notifications in 1998 were made to the United States (4,728). Switzerland had the fewest reportable transactions (27). Most agencies were clustered in the 125-320 range. Rowley and Campbell attribute the disparity in the number of notifications in the United States and Switzerland to country size. Two other exceptions -- Poland (1,750) and Germany (1,333) -- appear to result from using broad thresholds that capture more transactions than other jurisdictions.

<sup>35</sup> Submission by U.S. Chamber of Commerce, ICPAC Hearings (Apr. 22, 1999), at 3 [hereinafter U.S. Chamber of Commerce Submission], citing FTC & DOJ Annual Report To Congress Fiscal Year 1998. This conclusion is derived by the U.S. Chamber of Commerce by adjusting the jurisdictional thresholds in the HSR Act in light of the inflation statistics set forth at U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 489 (1998).



out that other legislation in Canada accounts for the effects of inflation: the threshold for a reviewable transaction under Section 14.1 of the Investment Canada Act is adjusted annually to account for inflationary effects.<sup>36</sup>

As these numbers suggest, indexing notification thresholds for inflation would exclude a significant number of transactions from notification and review. Given the significant cost of compliance, it seems reasonable not to subject so many competitively benign transactions to the notification and review process. At the same time, however, the Advisory Committee notes that an automatic indexing method may produce arbitrary results and cautions against raising thresholds to such a level that competition authorities' enforcement missions may be compromised. The trade-off for raising filing thresholds is less comprehensive antitrust enforcement. The ability of competition authorities to detect nonreportable mergers (and the risk that these transactions would go unreviewed), as well as the jurisdictional ability of competition authorities to investigate and challenge nonreportable transactions, must be factored into any decision to adjust notification thresholds.

The Advisory Committee recommends that each jurisdiction consider whether its notification thresholds are appropriate or too low. Jurisdictions, of course, should continue to set the precise level, balancing the cost of compliance with notification rules and regulations against the likelihood that notifiable transactions will generate appreciable anticompetitive effects within the jurisdiction. If an automatic indexing mechanism is not employed, the Advisory Committee recommends that the jurisdictions review their notification thresholds periodically (at least every four years) to determine whether they should be adjusted.

To better ensure that potentially anticompetitive transactions do not escape scrutiny, the Advisory Committee recommends that competition authorities should be given the authority to pursue potentially anticompetitive transactions even if they do not satisfy premerger notification thresholds.<sup>37</sup> Although the federal antitrust enforcement agencies in the United States already possess this authority, many existing merger regimes authorize regulators to review transactions only when premerger notification requirements are satisfied.

*Any efforts to revise notification thresholds also must account for the fact that filing fees currently constitute a significant source of revenue for numerous competition authorities, including federal antitrust agencies in the United States.* Ideally, no competition authority should be dependent on filing fees for its budgets, staff salaries, or bonuses. A linkage of this nature may skew incentives to revise notification thresholds because consideration of limitations that may be warranted on the basis of competition-oriented objectives must be weighed against the collateral

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<sup>36</sup> Rowley and Campbell Submission, at 16 and n.26.

<sup>37</sup> Of course, this may not apply in all jurisdictions, particularly the EU where transactions that fall below the EC Merger Regulation thresholds are potentially notifiable under member state merger regimes.



fiscal effects. Another risk that must be considered is that the ability of competition authorities to fund their law enforcement activities may be compromised when the current merger wave subsides.<sup>38</sup>

To ensure that these competition authorities will be able to pursue their enforcement missions vigorously, it is imperative to provide agencies with alternative sources of funding to offset the loss of any funds that may result from revision of notification thresholds. Although linking filing fees to agency budgets clearly is undesirable as a matter of sound public policy, delinking fees or raising thresholds is simply not tenable without offsetting measures.

A variety of measures may be employed to offset any loss of filing fees flowing from the adjustment of notification thresholds. For example, the revision of thresholds could be accompanied by measures to increase filing fees for reportable transactions, or to levy filing fees scaled to the size of the transaction. Similarly, filing fees also could be assessed based on the amount of work performed by the reviewing authorities. In Germany, for example, the size of the filing fee for a transaction depends upon the economic importance and complexity of the case. Filing fees generally range from DM10,000 to DM100,000 (for straightforward cases, it is typically less than DM20,000). In exceptional cases, the fee may amount to as much as DM200,000.<sup>39</sup> Similarly, in Switzerland, no fee is required if a transaction is cleared within the initial review period. A filing fee is imposed if a second-stage investigation is opened and is based on the amount of work performed by the agency. The Advisory Committee notes, however, that when a transaction must be reviewed in several jurisdictions, filing fees will quickly mount.

### **Reducing Uncertainty and Unnecessary Burden Imposed by Notification Thresholds**

Notification thresholds that do not clearly and objectively delineate the circumstances requiring parties to a proposed transaction to notify the competition authorities also impose uncertainty and unnecessary burden on merging parties.

#### *Objectively Based Notification Thresholds*

Imprecise and subjective notification thresholds impose significant transaction costs on parties to international mergers. Perhaps the biggest culprit in this category concerns notification thresholds based on market share tests, which many jurisdictions, although not the United States, currently use.<sup>40</sup> One drawback of market share tests arises from the inherent subjectivity of market

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<sup>38</sup> U.S. Chamber of Commerce Submission, at 4-5.

<sup>39</sup> Act Against Restraints of Competition §80(2).

<sup>40</sup> Jurisdictions employing market share tests to determine whether a proposed transaction is subject to notification obligations include, among others, Brazil (20 percent); Bulgaria (20 percent); Czech Republic (30 percent); Estonia (40 percent); Greece (25 percent); Israel (50 percent); Portugal (30 percent); Slovenia (50 percent); Slovakia (20 percent); Spain (25 percent); Taiwan (25 percent); Tunisia (30 percent); and Turkey (25 percent). See ABA Antitrust Section

share calculations: reasonable minds may differ concerning the definition of the relevant markets. Another disadvantage of market share tests concerns their inherent impreciseness: calculation of market shares requires an estimation of the size of the relevant market. In addition, the calculation of market shares may entail a full and substantive analysis of the proposed transaction, which parties should not be required to undertake simply to determine whether premerger notification requirements are met in any given jurisdiction.<sup>41</sup>

The difficulties associated with market share tests are exacerbated by interpretive ambiguities and inconsistencies. Under Greek rules, for example, a filing is required if either party meets the 25 percent market share threshold, regardless of whether there is any horizontal overlap or vertical relationship between the two parties. Until 1999 notification was required in Belgium if the parties (individually or together) had a market share of more than 25 percent in Belgium not only for overlapping products, but also in any “upstream,” “downstream,” or “neighboring” markets. Presumably in recognition of the inherent difficulties associated with market share tests, the Belgian authority abandoned that test and instead adopted a Belgian turnover test.

To spare merging parties significant and unnecessary transaction costs, the Advisory Committee recommends that the international community should promote the elimination of market-share tests in favor of objectively quantifiable and readily accessible information, such as sales or assets. In addition to the Belgian thresholds, positive examples in this regard include Canada (Canadian assets/sales tests); the Netherlands (Dutch turnover); and Switzerland (Swiss turnover).<sup>42</sup>

### *Transparency*

A lack of transparency in many jurisdictions makes it difficult to track and interpret myriad complex notification requirements (particularly in jurisdictions without a long history of merger control).<sup>43</sup> Jurisdictions should ensure that their merger review regimes are transparent generally, but should focus particularly on identifying notification thresholds, clarifying the manner in which those thresholds should be applied, and providing information on how to comply with premerger filing requirements.

Transparency may be facilitated in many ways. In Chapter 2 the Advisory Committee recommended that jurisdictions produce policy statements and annual reports on competition policy, and publish speeches and press releases. These sources also should be used to publicize changes in administrative practices or in the application of merger notification rules and regulations. In

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Multijurisdictional Merger Review Submission, at 6-7.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Keeshan Submission re the Pricewaterhouse/Coopers transaction, at 6-7; Byowitz and Gotts Submission, at 7.

addition, competition authorities should issue interpretations of notification threshold tests so that legal counsel can correctly advise clients on whether premerger notification of a proposed transaction is required. These interpretations of threshold tests should make clear whether they apply to domestic or global assets, revenues, and market shares. This need is particularly acute in developing economies in which the local bar is not experienced in handling complex transactions or competition matters.

The U.S. antitrust agencies have made a substantial effort to increase the transparency of the HSR rules and regulations, and their efforts to facilitate transparency provide a useful model for other jurisdictions. Informal interpretations of whether a transaction is notifiable can be obtained by calling or writing the Premerger Notification Office at the FTC. Informal interpretations from the FTC staff are collected and discussed in the ABA Antitrust Section, Premerger Notification Practice Manual, which is periodically updated. In addition, the U.S. agencies release significant volumes of materials to assist practitioners and businesses in complying with the HSR Act, including a source book that compiles HSR rules and regulations, Federal Register publications, form filing information, formal interpretations, press releases, speeches, an annual report, and merger guidelines.

#### **TARGETED REFORM: REDUCING BURDENS ON TRANSACTIONS IN THE MERGER REVIEW NET**

The Advisory Committee recognizes the inherent difficulty in designing objectively based notification thresholds consistent with enforcement objectives that will identify *only* potentially problematic transactions. Although the recommendations set forth in the preceding section are designed to screen out mergers unlikely to generate appreciable anticompetitive effects within a jurisdiction, to some extent notification of a broad range of transactions is necessary. Therefore, the goal should be to impose the minimum burden necessary on those transactions that fall within the merger review system of a given jurisdiction.

Detailed filing requirements and prolonged delays in merger reviews may impose significant and sometimes unnecessary or unduly burdensome costs on proposed transactions, particularly those that pose no harm to competition. To ensure that each jurisdiction refrains from unduly burdening transactions that trigger a notification obligation, the Advisory Committee recommends that merger review should be conducted in a two-stage process designed to enable enforcement agencies to identify and focus on transactions that raise competitive issues while allowing those that present none to proceed expeditiously. At each stage of the process, jurisdictions should set reasonable deadlines and time frames for review and craft focused information requests.



## **Setting Reasonable Deadlines and Time Frames for Review**

ICPAC outreach efforts reveal that heightened uncertainty and prolonged delays in merger reviews result in large part from a lack of strict deadlines and lengthy review periods.<sup>44</sup> To facilitate the expeditious and efficient review of transactions, particularly those that do not raise competitive concerns, the Advisory Committee recommends that the international community should promote the adoption of 30-day or one-month initial review periods and harmonization of rules about when parties are permitted to file premerger notification.<sup>45</sup> For transactions that raise serious competitive issues and require a more in-depth review, the Advisory Committee concludes that merger review should not be an open-ended process and that companies derive value from certainty with respect to merger review periods. One approach to provide greater certainty required for effective transaction planning is the adoption of nonbinding but notional time frames for second-stage review that vary in relation to the relative complexity of the transaction.

### *Triggering Events*

Rules pertaining to when merging parties are permitted or required to file premerger notification vary across jurisdictions. Some jurisdictions make premerger clearance mandatory, others make postclosing notification mandatory, and some jurisdictions make notification voluntary.

Jurisdictions also differ with respect to which types of events will trigger filing requirements. In a number of jurisdictions with preclosing notification requirements, such as the United States and Canada, a filing may be made as early as an agreement in principle is reached or a (nonbinding) letter of intent or contract has been signed. In a few jurisdictions, such as Germany, a filing may be

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<sup>44</sup> Hawk Submission, at 13. For example, had the parties in the Seagram/Polygram transaction been prepared to close the acquisition in three months (when EC and U.S. clearance had been granted) rather than six months (when all of the other corporate steps had been taken), serious problems could have arisen because of the amount of time some other national merger review authorities took to reach a decision. The agencies had the information they needed; some of them just took a long time to reach a decision. In addition to the EC and the United States, Australia, Brazil, Canada, Colombia, Mexico, Poland, and Taiwan were formally notified of this proposed merger. Submission by Kenneth R. Logan, Esq., Simpson Thacher & Bartlett, on behalf of himself and Edgar Bronfman, Jr., President and CEO, The Seagram Co., in response to Advisory Committee Multijurisdictional Merger Review Case Study questionnaire re the Seagram/PolyGram transaction, at 6 (March 26, 1999) [hereinafter Logan Submission re the Seagram/PolyGram transaction].

<sup>45</sup> One of the earliest driving forces behind procedural convergence was the concern that companies could engage in forum shopping and other strategically motivated behavior by using the procedural and substantive differences in various jurisdictions, and particularly differing time frames of review, to their advantage. For example, Seagram, in its acquisition of PolyGram filed first in the United States because Seagram expected the United States to “be on the critical path.” After the FTC cleared the transaction, Seagram filed in Europe where the company thought that the Merger Task Force would give some deference to the U.S. clearance. Logan Submission re the Seagram/PolyGram transaction, at 4-5. With markedly increased cross-border cooperation among antitrust authorities, the advantages that can be obtained from this type of strategic behavior are minimized. Nonetheless, provided mandatory deadlines are eliminated, harmonization of time frames would not prevent parties from staggering notification.

made whenever the intention of the parties has become sufficiently concrete to establish the structure of the transaction and the schedule for its implementation, or at least when a clear and serious intent to finalize the merger within a short time has emerged.<sup>46</sup> These systems give the parties with the flexibility of filing early in the transaction planning process (that is, during negotiations), at an intermediate stage (after signing the definitive agreement) or nearer to the end of the transaction process (generally no later than 30 days before the expected closing or completion, or 15 days in the case of cash tender offers).<sup>47</sup>

In several other jurisdictions, however, premerger notification is not permitted until the parties have executed a definitive agreement. For example, antitrust filings to the European Commission can be made only *after* the signing of a definitive merger agreement, acquisition of control, or announcement of a public bid.

Although most jurisdictions that require notification before closing do not impose a notification deadline provided the parties observe any statutory waiting periods before consummating the transaction, other jurisdictions require notification within a specified number of days after the triggering event. The EC technically requires notification one week after the triggering event has occurred, for example, although extensions may be granted. Similar requirements are imposed in Belgium (1 month), Finland (1 week), Greece (10 days), Hungary (8 days), Poland (14 days), and Slovakia (15 days). To the extent that parties must observe mandatory waiting periods following notification, these arbitrary filing deadlines are superfluous.<sup>48</sup>

Preparation of a notification form in regimes that have both definitive agreement requirements *and* filing deadlines may entail a substantial amount of work, making compliance with these notification deadlines generally difficult. (As discussed below, many of these jurisdictions require the submission of detailed information in the initial filing.) Failure to comply with the applicable premerger notification rules can result in significant fines whether or not the transaction has an anticompetitive effect in the jurisdiction.<sup>49</sup> In practice, the enforcement authorities in some of these jurisdictions have shown flexibility in granting extensions of time. However, the EC recently fined a company that did not observe the filing deadline (Samsung was fined ECU33,000

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<sup>46</sup> In some jurisdictions there is no triggering event. Rather, informal contacts are made with the competition authority to discuss the overall contours of the transaction and address any antitrust concerns.

<sup>47</sup> See Submission by Michael Reynolds, Allen & Overy, "Information Sharing and Procedural Harmonization: EU and US Merger Control Procedures and Cooperation," ICPAC Hearings (Nov. 3, 1998), at 4 [hereinafter Reynolds Submission].

<sup>48</sup> ABA Antitrust Section Multijurisdictional Merger Review Submission, at 11.

<sup>49</sup> For example, antitrust counsel informs the Advisory Committee of recent problems that parties meet under the Brazilian system, including threats to retroactively apply changes in the law so as to impose fines on parties for "late" notification.



(approximately \$37,000)); it was the first time the EC had imposed such a fine.<sup>50</sup> Moreover, having to seek waivers from each jurisdiction where a filing is required would be burdensome and increase transaction costs with no corresponding enforcement benefit.<sup>51</sup>

To permit merging parties to coordinate multijurisdictional filings in the most efficient manner and to facilitate cooperation among reviewing authorities, the Advisory Committee recommends that the international community promote harmonization of rules concerning when parties are permitted to file premerger notification. This can be accomplished by targeting reform efforts in those jurisdictions with definitive agreement requirement and postexecution filing deadlines to permit filings to be made at any time after the execution of a letter of intent, contract, agreement in principle, or public bid.

ICPAC hearing participants suggested that this type of reform might encounter some resistance, particularly in the EU, because reviewing a transaction that has not become the subject of a binding agreement would require the use of scarce Merger Task Force (MTF) resources. It was suggested that this concern could be addressed with a “good faith intention to consummate” representation similar to the HSR Act affidavit requirement (although, in jurisdictions with hefty filing fees, the fee alone may be sufficient to infer a good faith intention to consummate the transaction.)<sup>52</sup> Moreover, as discussed in Chapter 2, to the extent that requirements calling for a written opinion for each reviewed transaction are eliminated, additional resources may become available.<sup>53</sup>

### *Initial Review Periods*

In most jurisdictions, the initial review period runs for either 30 days or one month following notification. This is the approach employed in the United States, for example, where the DOJ and FTC smoothly process thousands of transactions each year under the premerger notification system created by the HSR Act. Notably, the U.S. agencies resolve approximately 97 percent of all notified transactions in 30 days or less.<sup>54</sup>

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<sup>50</sup> See Reynolds Submission, at 4. It is important to note, however, that the EC encourages parties to seek informal confidential guidance on procedural and substantive issues prior to notification. See Merger: Best Practices Guidelines at <<http://europa.eu.int/comm/dg04/merger/en/best-practice-gl.htm>>.

<sup>51</sup> ABA Antitrust Section Multijurisdictional Merger Review Submission, at 10-11.

<sup>52</sup> For example, Belgium permits filing on the basis of a draft agreement provided the parties state in the notification their intent to conclude an agreement that does not significantly depart from the draft agreement with respect to all elements relevant to the competition analysis.

<sup>53</sup> Reynolds Submission, at 9. Mr. Reynolds also suggests that reducing the extent of the information required for the MTF to review also may free up some resources.

<sup>54</sup> See FTC and DOJ Annual Report to Congress Fiscal Year 1998.



The initial review period in several other jurisdictions, however, substantially exceeds this time frame. These jurisdictions include France (initial review period of 2 months), Greece (3 months), Hungary (90 days), Poland (43 working days), and Taiwan (2 months). Others do not have fixed review periods (or do not strictly abide by them). These jurisdictions include Kenya (no prescribed review period) and the Czech Republic (indefinite review period).<sup>55</sup>

ICPAC hearing testimony suggests that marginal differences in the initial review periods are manageable from a transaction planning standpoint and are therefore inconsequential.<sup>56</sup> The Advisory Committee recommends that jurisdictions with initial review periods that substantially exceed 30 days or one month or are undefined be encouraged to amend their regulations to provide for a maximum initial review period of one month. Jurisdictions that are unable to terminate investigations before the expiration of the initial (or second-stage) review period(s) also should be given authority to grant early termination (for example, for transactions that raise no substantive issues or in which the parties are willing to resolve concerns through consent decrees or undertakings).

### *Second-Stage Review Periods*

Transactions that are identified at the initial filing stage as potentially raising serious substantive issues are subjected to more extensive review in all jurisdictions with merger control laws. Most jurisdictions also prohibit parties from going forward with the transaction for an extended period of time while the review is being conducted.<sup>57</sup> In some jurisdictions the extended waiting period is fixed and does not depend on the length of time required to comply with the reviewing authority's request for additional information, as long as that is done in a reasonable period of time. The European Commission has an initial review period of one month and an extended review period of four months, as do Austria and Switzerland. Similarly, Finland and

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<sup>55</sup> ABA Antitrust Section Multijurisdictional Merger Review Submission, at 10. In some jurisdictions authorities may clear or grant approval of a proposed transaction before the initial (or second-phase) review period expires. For example, in the United States, early termination may be granted for transactions that do not raise competitive concerns. Other jurisdictions (particularly in Europe and Japan) do not permit the reviewing agency to shorten waiting periods. Byowitz and Gotts Submission, at 8.

<sup>56</sup> ABA Antitrust Section Multijurisdictional Merger Review Submission, at 10.

<sup>57</sup> A number of jurisdictions, most notably the United States and the EU, impose an extraterritorial bar on closing pending review of a notified transactions. Other jurisdictions may require the parties to hold separate local subsidiaries or assets or not take irreversible measures until clearance has been obtained. As a result, closings have been delayed pending antitrust approvals from all relevant jurisdictions, and local assets or subsidiaries have been carved out or held separate pending approval. Many in the private bar have suggested that bars on closing should not be imposed extraterritorially but should be limited to local assets and subsidiaries. However this would limit the viability of extraterritorial remedies. In many cases divestiture of foreign-located assets or worldwide assets (such as intellectual property rights or rights to brand names) may be necessary to remedy anticompetitive effects in the reviewing jurisdiction.

Germany have an initial review period of one month and an extended review period of three months. In others, review periods may be tolled with each information request.

The Advisory Committee recognizes the costs associated with lengthy delays in the completion of a transaction and the need for a more expedited time frame for review in many parts of the world. The Advisory Committee concludes that merger review periods should not be open ended and that companies derive value from certainty with respect to transaction planning. more deadlines should be employed to provide greater certainty. The Advisory Committee believes more deadlines should be employed to provide greater certainty and that jurisdictions with lengthy or open-ended review periods should adopt more expedited time frames for review. The Advisory Committee makes a number of suggestions in the U.S. context to address these concerns. One possibility is nonbinding but notional time frames for second-stage review that vary in relation to the relative complexity of the transaction.

### **Refining Information Requests**

To ensure that transactions that trigger notification obligations are not faced with excessive information requirements, while at the same time ensuring that competition authorities have sufficient information to identify competitively sensitive transactions, the Advisory Committee recommends that information requests be structured in a two-stage process with focused information requests at each stage. The filing at the initial stage should require the minimum information necessary to make a preliminary determination of whether a transaction raises competition issues sufficient to warrant further review. Recognizing that there is a trade-off between the amount of information initially provided and the time frame in which clearance is to be granted, mechanisms also should be established to narrow the legal and factual issues as early as possible. One way to accomplish this goal would be to provide a short form-long form option. Alternatively, reviewing authorities may encourage merging parties voluntarily to provide sufficient information either to allow them to resolve any potential antitrust issues during the initial stage or to engage in a focused second-stage inquiry that narrowly targets the antitrust issues.<sup>58</sup>

The Advisory Committee recognizes that initial filing requirements in many jurisdictions may be statutorily imposed and that revising these requirements through legislative action may be time consuming. Until reform efforts can be achieved, the Advisory Committee recommends that

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<sup>58</sup> The less information the reviewing authority is initially given, the longer it may take the agency to clear the transaction because the agency will be forced to request further information. It was suggested to the Advisory Committee that the types of information that could usefully be submitted voluntarily by the parties include details on the overlapping markets, information sufficient to identify vertical relationships and general background information on the markets at issue, and market share information. The point was raised that counsel may initially resist providing market share information for a variety of reasons, including concerns about prematurely proposing a market definition or providing information that could spark closer investigation in cases that raise non-*de minimis* antitrust issues. Market share information, however, appears essential to conducting an initial review. Hawk Submission, at 8-10. See also information generally provided voluntarily by merging parties in the United States, discussed below.



jurisdictions consider permitting parties to submit an affidavit or letter (in lieu of a notification) alleging brief facts explaining why the transaction does not raise competitive concerns.<sup>59</sup>

### *Initial Filing Requirements*

The Advisory Committee acknowledges that agencies have a legitimate interest in requiring enough information to enable them to identify competitively sensitive transactions. Some jurisdictions, however, impose substantial and unnecessary burdens through the use of overly detailed initial filing forms. Many of the forms used in various jurisdictions require the submission of extensive information about markets, competitors, customers and suppliers, and entry conditions in each of the markets in which they operate. In some jurisdictions, extensive information is required even for markets in which there is no horizontal overlap or vertical relationship between the parties. Providing this information may require the creation or purchase of information, such as third-party market share reports, and may impose substantial burdens on merging parties that are unwarranted in transactions that do not raise competitive issues.<sup>60</sup>

One commentator observed that “[i]n some overly zealous jurisdictions, particularly in Eastern Europe, the initial form will require a top-to-bottom examination of the two companies involved in a merger, including obtaining and reporting information totally irrelevant to the merger’s competitive effects in that jurisdiction -- such as information regarding market share and sales revenues for each non-overlapping product and services offered by the acquiring company in that jurisdiction, or in some cases, worldwide.”<sup>61</sup>

Some jurisdictions also require translation or certification of documents filed with the initial notification. It is entirely understandable that countries require premerger filings to be submitted in the local language. Some countries go far beyond this, however, and require the translation of all supporting documents, including merger agreements and annual reports.<sup>62</sup> Some require that the entire merger agreement not only be translated, but that the translation be a certified and notarized (or apostille) translation. In addition, several jurisdictions require exhaustive certifications of the certificates of incorporation of all subsidiaries and affiliates, whether or not those entities have any relevance to the competition analysis. Box 3-C identifies several jurisdictions that have overly burdensome initial filing requirements.

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<sup>59</sup> Jurisdictions also should consider permitting a letter in lieu of notification in cases where the interests of the jurisdiction would be adequately protected by a review conducted by another jurisdiction.

<sup>60</sup> See Ilene Knable Gotts and Sarah E. Strasser, *Notification Rules Are Complex*, NATIONAL L.J., at C11 (May 4, 1998).

<sup>61</sup> Byowitz and Gotts Submission, at 10.

<sup>62</sup> *Id.*



### **Box 3-C: Examples of Burdensome Initial Filing Requirements**

**Belgium** requires essentially the same detailed level of information as is required by the European Commission's Form CO. Depending upon the transaction, parties may have to provide a detailed analysis of the relevant horizontal (if the parties are in the same market), vertical (upstream and downstream), and conglomerate markets (any market in which either party has a market share of 25 percent or more), as well as comprehensive information about the parties, their customers, and their competitors, for each of the Member States involved.

**Brazil** requires detailed information about the parties' worldwide activities and imposes onerous translation and procedural requirements (for example, not only must the entire merger agreement be translated into Portuguese, but it also must be a certified and notarized/apostilled translation).

**Hungary** requires, *inter alia*, a detailed breakdown of controlled entities (including creation of a chart showing "control relationships"); identification of other entities on the boards of which directors of the parties sit; sales for direct *and* indirect participants; a description of acquisitions in the last two years that were not reported; market definitions; parties' sales and shares in such markets; expectations of growth in market share; identification of competitors, customers, and suppliers; description of entry conditions; significance of research and development efforts; supply and demand factors; and horizontal and vertical relationships.

**Mexico** requires exhaustive certifications of the certificates of incorporation of all subsidiaries and affiliates, whether or not they have any relevance to the competition analysis, and otherwise imposes highly formalistic burdens that are not needed for the competition authority to analyze whether the proposed transaction is likely to generate harm to competition.

**Slovakia** requires detailed asset information for the parties and affiliates involved; market definitions; market share calculations; balance sheets and financial statements for the parties, "including undertakings in which the parties have an ownership interest or stock or in which they are directors, officers or otherwise similarly interconnected"; a description of reasons for and effects of the concentration and its competitive impact; and a list of principal suppliers, customers, and competitors of the parties.

**Turkey** requires definitions of relevant markets (product and geographic); contact information regarding competitors and customers; estimated market shares of competitors; a description of entry conditions; submission of "account information" (in addition to that contained in annual reports); and production of business plans, market research, and related studies by the parties or by "third persons." Even if the merger thresholds are not met, the parties may be required to submit detailed information concerning "other agreements, decisions or practices" affecting Turkey, such as distribution agreements by foreign parties with local sales agents.

Source: Submission by the American Bar Association Section of Antitrust Law, "Report on Multijurisdictional Merger Review Issues," ICPAC Hearings (May 17, 1999).

Submissions from ICPAC hearing participants illustrate how some jurisdictions that have more experience with merger control employ varying methods to identify and focus on transactions that raise competitive issues while minimizing filing burdens on nonproblematic transactions.<sup>63</sup> One way is to use a detailed form at the initial filing stage that is administered in a flexible manner. This type of practice has been employed, for example, in the European Union. The EU's Form CO is quite burdensome on its face asking for extensive information about the markets in which either of the merging firms operates, and for each such market, extensive information concerning competitors, market shares, and entry conditions. This information must in theory be provided even for markets in which there is no competitive overlap between the merging parties.<sup>64</sup>

Before filing the form, however, merging parties are encouraged to contact the MTF to describe and provide basic information with respect to the proposed transaction, the merging parties and any competitive overlaps. During or shortly after that discussion, the MTF identifies for the parties the markets for which information will be required and the level of detail in which the information should be presented. In many transactions, the MTF grants derogations that free the parties from the need to provide much of the information that is technically required by the filing form.<sup>65</sup> In practice, these discussions also have enabled the parties to identify issues early on and potentially resolve them within the initial review period.<sup>66</sup>

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<sup>63</sup> ABA Antitrust Section Multijurisdictional Merger Review Submission, at 13-20.

<sup>64</sup> *Id.*, at 14, 18. Under the German system, there is no specific filing form. The Act Against Restraints on Competition of 1958, as amended, sets out the minimum information to be filed. In practice, the amount of information required varies from very little in most transactions to far more extensive data in deals that appear to raise competitive issues. The onus is on the merging parties to provide sufficient information to allow for a preliminary assessment by the FCO. This is frequently worked out in informal consultations with the FCO. The German authorities have routinely cleared transactions in a very short time after an initial filing (ten days to two weeks, or even less) when the transaction is uninteresting from a competitive standpoint.

<sup>65</sup> The European Commission is launching "Merger Review 2000," a review of the EC Merger Regulation that includes an assessment of the possibility of revising filing requirements. Options under consideration include reducing the information requirements for classes of typically unproblematic mergers (which would be an extension of the current short form available for certain qualifying joint ventures) and a proposal for a form of block exemption for unproblematic cases. See Götz Drauz and Thalia Lingos, *The Treatment of Trans-border Mergers in the 1990s: A European Perspective*, at 55, 61, in *POLICY DIRECTIONS FOR GLOBAL MERGER REVIEW; A SPECIAL REPORT BY THE GLOBAL FORUM FOR COMPETITION AND TRADE POLICY* (1999).

<sup>66</sup> In contrast, some practitioners have indicated that the clearance process in the United States hinders the ability of the agencies to provide prenotification guidance. In 1995, the federal antitrust enforcement agencies in the United States implemented a number of measures designed to expedite the premerger review process, including the clearance process. One step permits the agencies to provide joint meetings with parties who request the opportunity to provide additional information or analysis before a clearance decision is made. See 1995 Joint DOJ/FTC Premerger Program Improvements (Mar. 23, 1995), *reprinted at* 6 Trade Reg. Rep. (CCH) ¶42,751. In addition, when the agencies learn about a possible merger, frequently one agency will request clearance to begin investigating it rather than wait for the parties to submit their notification. If there is no difference of opinion between the agencies, clearance can be granted and a preliminary investigation will be opened. See John J. Parisi, U.S. Federal Trade Commission, Enforcement



ICPAC hearing participants note that the EU system has worked fairly well in avoiding the imposition of undue burdens on transactions that do not raise competitive issues but would not recommend the EU model as a suitable international template. It would obviously be burdensome to deal with a dozen or more jurisdictions that use an analogue to the EU initial filing process because that would require separate discussions with each jurisdiction.

In contrast, the systems employed by the United States and Canada can serve as useful templates for the initial filing stage. The United States, for example, requires only limited information in the initial notification form. The limited nature of the form flows from the recognition that the HSR Act thresholds capture a broad universe of transactions, and that the vast majority raise no competitive concerns.<sup>67</sup> This is not to say that no burden is imposed: a company with multiple product lines, subsidiaries or affiliates must expend a fair amount of effort when it first completes the HSR form. The process of collecting the documents submitted with the form can be time consuming as well. The burden is sufficiently manageable, however, and those companies that frequently make acquisitions may choose to keep the nontransaction-specific portions of their HSR form current so that they are able to complete a filing for a new transaction without too much additional effort.

Several practical techniques also have developed in the United States to focus the legal and factual issues during the initial review stage.<sup>68</sup> Parties voluntarily may choose to supplement the initial notification with a “White Paper” containing a competition analysis of the transaction. The U.S. agencies also may ask the parties to provide additional information voluntarily within the initial 30-day review period. The agencies have been able to use this information to identify and often

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Cooperation Among Antitrust Authorities, before the IBC UK Conferences Sixth Annual London Conference on EC Competition Law (May 19, 1999)(Updated Nov. 1999) [hereinafter Parisi, IBC Address]. However, a number of outreach respondents suggested that the clearance process could benefit from further reform to assure the availability of coordinated joint meetings.

<sup>67</sup> The HSR Form requires fairly basic information, including a description of the transaction, the parties’ most recent filings with the Securities and Exchange Commission, lists of certain subsidiaries and affiliates, and SIC Code data (data reported to the census bureau every five years). For example, U.S. sales by 4, 5, and 7-digit Standard Industrial Classification codes and geographic market data for transactions where 4-digit overlaps exist must be provided. Additionally, general information regarding the corporate structure, subsidiaries, minority stock interests, previous acquisitions (if overlap), and any vertical buyer-seller relationship between the parties must be provided. Also filed with the form are copies of all studies, surveys, analyses or reports prepared by or for any officer or director for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product and geographic markets (these latter documents are commonly referred to as 4(c) documents). Item 4(c) documents are frequently the most informative part of an HSR filing.

<sup>68</sup> See Ky P. Ewing, Jr., Some Thoughts and Lessons From Our Twenty Years of Experience with the United States’ Merger Notification Regime, Before the International Bar Ass’n Antitrust Seminar on The Future of Merger Control in Europe, at 7-8 (Sept. 26, 1997).



resolve the antitrust issues within the initial review period.<sup>69</sup> As described more fully below, if, after an initial review, the transaction appears to raise potentially serious competitive concerns, a formal request for additional documents and information may be issued before the end of the initial waiting period.

Canada uses a system that employs two different initial forms, known as the short form and the long form. Both forms require basic information such as a description of the proposed transaction, copies of current drafts of relevant legal documents, descriptions of the principal businesses of the notifying party and its affiliates, certain financial information, certain documents filed with stock exchanges and securities commissions, and any pro forma financials on the combined firm.<sup>70</sup> The short form is designed for transactions that do not raise competitive problems. The long form, used for transactions that may raise competition issues, requires significantly more information concerning affiliates of the notifying party and the products produced, supplied, or distributed by the parties and their affiliates, as well as the filing of all financial or statistical data prepared to assist the board of directors or senior management of the parties in analyzing the proposed transaction. Canada places the onus on the merging parties to select in the first instance which form to file. As a result, parties tend to choose the form most appropriate for their transaction.

Canada also permits merging parties to apply for an Advance Ruling Certificate (ARC), which is issued at the discretion of the director of the Bureau of Competition Policy. If one is granted, then no premerger notification is required. If one is denied, the parties must file an initial notification form if their transaction is notifiable. Generally, an ARC can be obtained with the submission of less information than is required under either the long or short form. Usually the parties provide a description of their businesses and show that they do not overlap or, if they do, that the market shares

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<sup>69</sup> This information generally includes a list of products sold by each party, limited by geographic areas and to competitive overlaps; product brochures and promotional materials; recent sales or marketing reports; a general description of overlap or vertical markets, including internal or third-party market studies; a list of each company's ten largest customers for each designated product, along with a contact person, address, phone number and the dollar value of purchases during the last year; a list of each company's ten largest competitors for each designated product, along with a contact person, address, phone number and estimates of each party's and each competitor's share of the market; weekly price and quantity information such as information purchased from Nielsen, IRI or other market research companies; and copies of antitrust notifications made to other jurisdictions. Staff also may interview customers and competitors and obtain the opinion of economists involved in the investigation.

<sup>70</sup> Under recently enacted amendments to the Canadian Competition Act, the Act's premerger notification provisions have been revised in a number of ways. The information required by the short form increased slightly, while the information called for by the long form increased substantially. The changes became effective on the issuance of implementing regulations effective on December 27, 1999, by the Canadian Competition Bureau. The short form had a seven-day waiting period extended to 14 days. The long form had a 21-day waiting period extended to 42 days. If the short form is chosen, and the Canadian Competition Bureau determines that it needs more information, then it may require the merging parties to submit the long form, which triggers the running of the longer waiting period, without any credit for the shorter waiting period. ABA Antitrust Section Multijurisdictional Merger Review Submission, at 16-18.

are too low to warrant concern under the standards applied in Canada. The Competition Bureau can act on ARC requests in as little as two weeks.

Some efforts have been made at the international level to reduce notification burdens. For example, France, Germany, and the United Kingdom introduced a common merger notification form in September 1997. This form is accepted by all three antitrust authorities for mergers that are notifiable in more than one of these countries. It is a voluntary regime that results from cooperation between the authorities to simplify the procedure for multiple notifications.<sup>71</sup> On another front, the Competition Law and Policy Committee of the OECD undertook a review of OECD members' merger notification practices and released a framework for a merger notification form.<sup>72</sup> The framework seeks to synthesize the common elements of the merger notification forms currently employed by OECD members.

Harmonizing the procedural requirements of different jurisdictions is itself not an easy task; some observers also question whether these efforts will significantly reduce transaction costs. In some cases it might well increase them by imposing more burdensome notification requirements than some jurisdictions currently require. These observers also note that while a standardized form would eliminate or reduce the costs associated with duplicating certain information, the main transaction costs associated with merger control do not result from having to submit similar information to several different agencies. Indeed, the actual incidence of truly duplicative information is somewhat limited, because much of the information is necessarily specific to individual jurisdictions and markets.<sup>73</sup> For these reasons, the recommendations made by the Advisory Committee focus more heavily on limiting the information required in connection with transactions that lack antitrust significance.

Still, there is much that can be gained from multilateral efforts of the type undertaken by the OECD. The United States should continue to support further OECD efforts to develop a framework

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<sup>71</sup> Although laudable, the Common Form may be of relatively limited practical value because the consequences of using it vary from country to country. In the UK, the Common Form does not trigger the statutory timetable provided for in section 75A of the Fair Trading Act 1973 (FTA): a Merger Notice would have to be filed if the parties wished to take advantage of the statutory timetable. Nevertheless, the UK Office of Fair Trading states that it hopes to indicate within one month of receipt of a complete Common Form whether the transaction qualifies for investigation by the Mergers and Monopoly Commission. In France, use of the Common Form will result in the French authorities' endeavoring to indicate within one month of the receipt of a complete Common Form whether a formal notification is advisable. In Germany, the notifying parties using the Common Form will be told within one month if further examination is required. See Submission by Mark W. Friend and Antonio F. Bavasso, Allen & Overy, in response to Advisory Committee Multijurisdictional Merger Review Case Study questionnaire re the Federal-Mogul/T&N transaction, at 3 (April 14, 1999); see also Comments of the Section of Antitrust Law of the American Bar Association on the Common Form for Mergers in the United Kingdom, in France and in Germany at <<http://www.abanet.org/antitrust/common.html>>.

<sup>72</sup> OECD Competition Law and Policy Committee, *Report on Notification of Transnational Mergers*, DAF/CLP (99)2/Final (Feb. 1999).

<sup>73</sup> Hawk Submission, at 5-7; ABA Antitrust Section Multijurisdictional Merger Review Submission, at 18-20.



for notification, including the development of common definitions. The Advisory Committee recommends that the OECD continue to focus its efforts on identifying the minimum information required to make a preliminary determination of whether a transaction raises sufficient competition issues to warrant further review and to specify the categories of data that may be useful to narrow the factual issues to resolve any potential antitrust issues or engage in a focused second-phase inquiry.<sup>74</sup> Areas in which countries usefully could collaborate also could be identified and explored. For example, common approaches to issues such as defining relevant markets, barriers to entry, market power, and efficiencies may be usefully developed.<sup>75</sup>

As part of an OECD effort, the Advisory Committee recommends that consideration also be given to ways to reduce other unnecessary burdens. Included on the agenda should be efforts to reduce translation costs and certification and other procedural requirements. The Advisory Committee finds merit in the suggestion that parties should be able to provide brief summaries of certain foreign language documents or partial translations (limited to translation of closing conditions and other important relevant provisions in the merger agreement) on the condition that full translations, if requested, would be provided within a time certain. The U.S. system, which reduces the translation burden in the initial notification form for foreign language documents, provides a useful model. Merging parties are not required to translate many of the documents requested (such as annual reports, audit statements, balance sheets and studies, surveys, analyses, and reports), but must instead submit English language outlines, summaries or translations that already exist.

### *Second-Stage Investigations*

For proposed transactions that are identified in the initial review stage as potentially raising serious substantive issues, most jurisdictions require the submission of more detailed information. The amount of information and documents that the parties are required to submit in these more thorough investigations varies from jurisdiction to jurisdiction. With the exception of the United States, this second-stage review process typically is not document intensive. Although the HSR system avoids placing undue burdens on merging parties at the initial filing stage, it is by far the most demanding in the second-stage review process with respect to the information and documents that merging parties are required to provide.

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<sup>74</sup> Multiple and differing data requests can complicate reviewing authorities' attempts to conduct coordinated merger reviews. Even where the analytical approach is similar, if the input data are different, the outcomes will not necessarily coincide. Outreach respondents emphasize that even in parallel proceedings, reviewing authorities may fail to cooperate in requesting and analyzing a single set of data. See Comments of American Airlines, Inc. by Greg A. Sivinski, Senior Attorney, American Airlines (March 15, 1999), submitted for inclusion in the Advisory Committee record.

<sup>75</sup> See Coleman Submission re the Halliburton/Dresser transaction, at 3 ("While it was clear that the [United States and the EC] did talk and share certain data, it was also clear that, ostensibly because of different standards to be applied under the different substantive laws, the two investigating staffs sought data at different levels of abstraction in their efforts to define antitrust markets and appeared to place no particular credence on the definitional work of the other jurisdiction's staff.").



The differences in the information requirements of various systems generally are attributable to different legal cultures. In the United States, for example, the agencies do not have the power to block a problematic transaction themselves, but instead must ask a federal court to enjoin the transaction.<sup>76</sup> As a result, the agencies may feel that they need far more extensive information and documents than do their counterparts in jurisdictions like the EU, where the agency itself can block a merger, subject to *ex post* judicial review. As a practical matter, however, few companies can keep their deals together for the many months or years that it takes to seek judicial review in the EU.<sup>77</sup>

Further, when drafting a second request, DOJ and FTC staff are sometimes at a disadvantage because they lack access to information about the industry, the proposed transaction, and other key facts. From the U.S. government officials' perspective, moreover, anything outside the scope of the second request, from a practical standpoint will not be available to the reviewing agencies. Second requests, therefore, are broadly drafted to ensure access to a wide array of potentially relevant information. Notably, data provided by the agencies indicate that most parties comply only partially with second requests and that the transactions are resolved with relatively modest document productions and limited translation requirements.<sup>78</sup> These data largely are explained by the institution of a "quick look" policy in 1995, which encourages document production in stages. Using this approach, the agencies focus initially on issues that may be determinative in concluding that the transaction likely does not raise competitive concerns. If the agencies can reach that conclusion based on a quick look, full document production is not required. Nonetheless, as

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<sup>76</sup> Some practitioners question the legitimacy of this concern:

The HSR process was designed to give the Agencies sufficient information to determine whether or not to challenge a merger. Preliminary injunction merger cases frequently involve extensive, expedited discovery in which the Agency (as well as the merging parties) can seek to enhance its litigation position. But the United States' Agencies frequently appear to seek far more information and documents than they reasonably require to litigate. There are systems where the Agency has to go to court to stop a transaction, as in the United States, but where the process does not involve the massive document productions that are common in the U.S. process. Canada is an example. The need to be prepared for litigation does not justify the sweeping breadth of Second Requests in the United States.

ABA Antitrust Section Multijurisdictional Merger Review Submission, at 21-23. It is interesting to note that in fiscal year 1998, the DOJ filed only 15 complaints; 10 were settled, four of the transactions were abandoned, and another was abandoned pursuant to a consent decree. Similarly, FTC staff were authorized to seek injunctions in only three transactions; two were abandoned following court decisions, and one resulted in an administrative complaint. FTC and DOJ Annual Report to Congress Fiscal Year 1998. Efforts to address the second-request process are discussed later in this chapter.

<sup>77</sup> ABA Antitrust Section Multijurisdictional Merger Review Submission, 21-22.

<sup>78</sup> Letter from Constance K. Robinson, Director of Operations & Merger Enforcement, U.S. Dep't of Justice, Antitrust Division, to James F. Rill and Dr. Paula Stern (July 14, 1999) [hereinafter Robinson Letter]; Letter from William J. Baer, Director, Bureau of Competition, U.S. Federal Trade Commission, to James F. Rill, Esq. and Dr. Paula Stern (June 15, 1999) [hereinafter Baer June 15, 1999 Letter].

described below, there are notable instances where merging parties have been required to submit hundreds, if not thousands, of boxes of documents, multiple gigabytes of computerized data, and extensive answers to dozens of interrogatory questions. These instances fuel the perception that second requests are unduly burdensome and “require the production of an enormous volume of materials, many of which are unnecessary for even the most comprehensive merger review.”<sup>79</sup>

While recognizing the many strengths of the U.S. system, the Advisory Committee recommends a number of practices designed to instill more discipline in the U.S. system and to address some of the problems perceived by the business community and private bar. Some of these recommendations are practices designed to narrow the legal and factual issues and resolve antitrust issues expeditiously. Set out below are those that may serve as useful recommendations in other jurisdictions.

Of paramount importance is that there be an open exchange of information between competition authorities and the parties to a proposed transaction. This may require modifications in conduct both by the parties and reviewing authorities. The merging parties should recognize that the process works best when both sides engage in a cooperative dialogue early in the process.

To facilitate this process, the reviewing authority should tell the merging parties (either orally or in writing) at the beginning of a second-stage inquiry why it did not clear the transaction within the initial review period.<sup>80</sup> If the reviewing authority chooses to issue a written statement, the document need not be made public nor researched and written with the rigor of a judicial opinion. Rather, it should be a short and plain statement of the competitive concerns that led the reviewing authority to continue rather than terminate the investigation. Furthermore, this statement should not limit the reviewing authority’s discretion to pursue any new theories of competitive harm if new information comes to light.

This type of reasoned explanation would provide several benefits. First, it would facilitate transparency of agency action, which is still a problem in many parts of the world. While cognizant of the need to refrain from overburdening agencies, the Advisory Committee also believes that it is important to ensure that the reviewing authority possesses a substantively sound and clearly articulated basis for moving forward. Second, an explanation of this type would reduce transaction costs by allowing the parties to focus their efforts on the issues identified as problematic, thereby permitting a resolution to be reached as quickly as possible. Third, delays would be reduced by

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<sup>79</sup> Letter to Casey R. Triggs, Esq., Deputy Assistant Director, U.S. Federal Trade Commission from The Association of the Bar of the City of New York Committee on Antitrust & Trade Regulation, at 2 (June 29, 1999), submitted by the authors for inclusion in the Advisory Committee record [hereinafter New York City Bar Ass’n Committee Submission].

<sup>80</sup> This is the practice in the EU.



preventing, or at least discouraging reviewing authorities from opening a second-stage inquiry simply to gain more time to review a proposed transaction.<sup>81</sup>

Agencies around the world also could assess their own performance with respect to those transactions they challenge. One way to do this is an after-the-fact audit of select merger challenges. Audits of this type have been used in transition economies as a condition for receiving assistance from groups such as the OECD. During these audits, the host country's competition authorities permit a group of outside observers to examine in great detail their decisions to prosecute, or to refrain from prosecuting, specific matters. These observers also examine the types of information collected during each investigation. The aim of these audits lies in obtaining an objective and frank assessment of performance in previous investigations, thereby laying the groundwork for improvement in future cases.<sup>82</sup> Audits could be conducted internally in more mature merger regimes or by a group of outside observers in newer regimes.

#### **ADVISORY COMMITTEE RECOMMENDATIONS FOR TARGETED REFORM IN THE UNITED STATES**

In the preceding sections the Advisory Committee recommends a number of initiatives designed to rationalize the application of merger review procedures. The Advisory Committee believes that the United States should play a leading role in the effort to implement the reforms proposed herein in the international arena. One of the most effective ways in which the United States can stimulate global reform is through leading by example. It is therefore important that the United States examine its own merger review system in an attempt to identify and correct those aspects of the system that give rise to uncertainty and unnecessary transaction costs.<sup>83</sup> As one ICPAC hearing participant stated:

In light of the proliferation and disparity of filing requirements around the globe, the increasingly complicated regulatory framework, and the associated escalation of transaction costs to meet the demands of the myriad jurisdictions, the United States can serve an important role by establishing a benchmark for the rest of the world. Before the United States can legitimately lay claim to a position of global leadership in the

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<sup>81</sup> See Hawk Submission, at 10-12.

<sup>82</sup> Remarks by William Kovacic, Professor of Law, George Washington University Law School, at ICPAC Committee Meeting (July 14, 1999), Meeting Minutes, at 74-78.

<sup>83</sup> The Advisory Committee focused on best practices that should guide merger review globally and in the United States. The Advisory Committee did not seek to address each aspect of the U.S. merger review system. Indeed, if the Advisory Committee were designing a merger review system, it would not adopt all features of the U.S. system. For example, some members of the Advisory Committee would not recommend the design of a system with dual enforcement of antitrust laws, such as the dual enforcement of the federal antitrust laws by the DOJ and the FTC. Rather, the focus of the Advisory Committee lay in identifying those features of the U.S. system that are either exemplary or problematic and that directly affect international transactions.



field of merger review, however, the U.S. first needs to conduct a balanced, candid assessment of its domestic requirements.<sup>84</sup>

## **Recommendations on Threshold Requirements**

The regime currently in place in the United States requires no change with respect to two of the Advisory Committee's recommendations on premerger notification thresholds. The notification thresholds are objectively based, and the U.S. antitrust agencies ensure the transparency of these thresholds and their application by offering guidance to practitioners and businesses through published rules, regulations, guides, speeches, and press releases, and through the advisory services of the FTC Premerger Office.<sup>85</sup>

The area in which the U.S. notification thresholds fall short is in screening out transactions that are unlikely to generate appreciable anticompetitive effects within the United States. As discussed more fully below, this goal may be accomplished by raising the notification thresholds.

### *Nexus to the Jurisdiction*

The United States has a well-established history of asserting jurisdiction over international mergers.<sup>86</sup> By providing exemptions from reporting requirements for certain transactions involving foreign persons, however, the HSR Act ensures that only parties to transactions with a nexus to the jurisdiction must notify the U.S. antitrust authorities.<sup>87</sup> Notification obligations for foreign transactions (where the acquiring and acquired persons are both foreign) are triggered only if the

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<sup>84</sup> U.S. Chamber of Commerce Submission, at 2.

<sup>85</sup> The Advisory Committee commends the transparency of the U.S. system and encourages the agencies to continue updating these valuable resources on a regular basis or as new developments occur.

<sup>86</sup> In 1995, the DOJ and the FTC released Antitrust Enforcement Guidelines for International Operations, U.S. DEPARTMENT OF JUSTICE/FEDERAL TRADE COMMISSION, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS §3.14 (1995) *reprinted in* 4 Trade Reg. Rep. (CCH) ¶13,107 (1995). These Guidelines set forth the antitrust agencies' policy on international antitrust issues and outline the agencies' position on jurisdiction over different types of international conduct. The guidelines provide several examples regarding both mergers and joint ventures and reaffirm the agencies' intention to assert subject matter jurisdiction over any transaction that would affect either U.S. import trade or U.S. export commerce. The guidelines state that "Section 7 of the Clayton Act applies to mergers and acquisitions between firms that are engaged in commerce or in any activity affecting commerce. The Agencies would apply the same principles regarding their foreign commerce jurisdiction to Clayton Act Section 7 cases as they would apply in Sherman Act cases." The guidelines also make note of the 1986 OECD Recommendation, which requests that OECD countries notify each other during the merger review process when their actions might affect the interests of other countries (subsequently replaced by the 1995 Revised Recommendation).

<sup>87</sup> See 16 C.F.R. §802.50-52. It is important to note that even if a proposed transaction involving foreign parties or foreign assets is exempt from premerger notification obligations in the United States, the U.S. agencies have the authority to challenge that transaction if it is likely to substantially lessen competition in the United States.

acquired party possesses more than a *de minimis* U.S. presence.<sup>88</sup> Further, where both parties are foreign, the rules also provide an exemption if their aggregate annual sales in or into the United States are less than \$110 million and their aggregate total assets in the United States are less than \$110 million. In addition, all acquisitions of foreign assets by a foreign person are exempt from HSR notification requirements regardless of the amount of sales into the United States attributable to those assets.<sup>89</sup>

The HSR Act also exempts from notification obligations certain acquisitions by U.S. persons of foreign assets and shares. An acquisition of foreign assets is exempt from notification requirements if the acquiring person will not hold assets of the acquired person that accounted for \$25 million or more in sales in or into the United States during the preceding year. An acquisition of shares of a foreign issuer is exempt from notification requirements unless the foreign issuer holds \$15 million or more of U.S. assets or generated sales in or into the United States of \$25 million or more during the preceding year.<sup>90</sup>

Despite the exemptions for certain classes of foreign transactions, in fiscal year 1999, the HSR Act captured 849 transactions involving a foreign acquiring person or foreign acquired entity, an increase from 736 the previous year. Of the 849 transactions, preliminary investigations were opened in 111, and second requests were then issued in 21. Enforcement actions were undertaken in only 5 of the 849 transactions.<sup>91</sup> These statistics suggest not only that very few foreign transactions pose the potential for anticompetitive effects significant enough to warrant the intervention of the U.S. antitrust agencies, but also that many more transactions than may be necessary come within the U.S. merger review net. As a result several respondents to ICPAC outreach efforts have called for reform of the foreign person exemptions.<sup>92</sup>

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<sup>88</sup> The acquisition by a foreign person of shares in a foreign issuer is exempt if the acquisition does not confer control of either an issuer that holds \$15 million of U.S. assets or a U.S. issuer with annual sales or total assets of \$25 million or more, whether domestic or foreign. By virtue of the definition of control under the HSR Act, all acquisitions by foreign persons of voting securities in foreign issuers are exempt if those shares do not exceed 50 percent of the outstanding voting securities of the foreign issuer. *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> U.S. DOJ Premerger Office; *see also* Annex 2-B. For fiscal year 1999, statistics for transactions involving foreign persons -- second requests in 21 of 849 foreign transactions (2.5 percent) and challenges to 5 of 849 foreign transactions (0.6 percent) -- are almost identical to rates for all HSR transactions (2.4 percent and 1.6 percent).

<sup>92</sup> *See, e.g.,* Submission by Michael Sennett, Bell, Boyd & Lloyd, in response to the Advisory Committee Multijurisdictional Merger Review Case Study questionnaire re the Baxter International Inc./Immuno International AG transaction, at 4 (April 9, 1999) [hereinafter Sennett Submission re the Baxter International Inc./Immuno International AG transaction].



Because of difficulties in obtaining data regarding the nature and extent of filings for transactions with an international aspect, the Advisory Committee believes that it is not in a position to make specific recommendations on exemption amounts for foreign transactions. Given that these levels have not been adjusted for many years, however, the Advisory Committee recommends that the FTC review the scope and level of the HSR exemptions for transactions involving foreign persons and that the U.S. antitrust agencies give serious consideration to the threshold exemptions to ensure that transactions that are not likely to violate the antitrust laws are exempt from premerger reporting classes of transactions.<sup>93</sup>

### *Appreciable Anticompetitive Effects*

More generally, the Advisory Committee recommends that the current notification thresholds be carefully reviewed to ensure that they are only as broad as necessary to identify transactions that may cause an appreciable anticompetitive effect. *While recognizing that small transactions are not necessarily competitively benign, the Advisory Committee finds that the notification thresholds currently employed by the premerger notification regime are too low and capture too many lawful transactions.* The Advisory Committee believes that the United States will not be well positioned to advocate that other jurisdictions review and revise their own premerger notification thresholds until it has addressed these same issues in its own system.

Enacted in 1914, the Clayton Act prohibits mergers whose effect “may be substantially to lessen competition or tend to create a monopoly.” The Clayton Act incorporates what has been characterized as an “incipiency standard,” thereby empowering the U.S. antitrust agencies to prevent potentially anticompetitive mergers before they result in harm to competition. The premerger notification regime contained in the HSR Act is intended to give the U.S. antitrust enforcement agencies “an effective mechanism to enjoin illegal mergers *before* they occur.”<sup>94</sup> With limited exceptions, the HSR Act requires premerger notification for each acquisition of assets or voting securities that exceeds \$15 million (or that results in control of an acquired party with at least \$25 million in sales or assets) in which one party to the transaction has at least \$100 million in sales or assets and the other has at least \$10 million in sales or assets.<sup>95</sup>

The DOJ and FTC Horizontal Merger Guidelines explain that while challenging potentially anticompetitive mergers, the U.S. antitrust agencies seek to avoid unnecessary interference with the larger universe of mergers that is either competitively beneficial or neutral.<sup>96</sup> As discussed above,

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<sup>93</sup> See 15 U.S.C. § 18a(d)(2)(B).

<sup>94</sup> S. Rep. No. 94-803, at 72 (1976).

<sup>95</sup> 15 U.S.C. § 18a.

<sup>96</sup> U.S. Dep’t of Justice and Federal Trade Commission, Horizontal Merger Guidelines at 0.1 (Apr. 1992), as amended (Apr. 8, 1997), *reprinted at* 4 Trade Reg. Rep. (CCH) ¶13,104.



however, only a small percentage of transactions captured by the notification thresholds currently in place leads to enforcement action. Indeed, no enforcement action is taken against more than 98 percent of all notified transactions. In addition, the annual level of filings made with the U.S. antitrust agencies has increased significantly since the HSR Act was enacted. The Advisory Committee believes that this increased level of filings is attributable not only to increased merger activity, but also to the failure to adjust the notification thresholds. They have not been changed since the HSR Act was enacted in 1976.

The most straightforward way to decrease the number of required filings while not materially compromising the agencies' enforcement mission is to increase the size-of-transaction threshold for acquisitions of voting securities and assets. Business groups and others have recommended to the Advisory Committee that the notification thresholds be adjusted to account for inflation and indexed to account for future inflation.<sup>97</sup> Adjusting for inflation using the Consumer Price Index, for example, the \$15 million size-of-transaction threshold in 1976, if measured in 1998 dollars, would now be set at approximately \$43 million. Increasing the threshold commensurate with the gross domestic product deflator, an indicator of inflation in the entire country, translates into an HSR threshold of \$37.8 million when measured in 1998 dollars.<sup>98</sup>

The Advisory Committee acknowledges the benefits of this recommendation but notes that an indexing mechanism may produce arbitrary results. At the same time, the Advisory Committee recognizes that absent an automatic (that is, mandatory) indexing mechanism, there may be no incentive to raise the thresholds. If an indexing method is not used, the Advisory Committee recommends that Congress and the U.S. antitrust agencies review notification thresholds periodically (at least every four years) to determine whether they should be increased.

Enforcement statistics for 1998 suggest that adjusting the notification thresholds to keep up with inflation measured in 1998 dollars should not materially compromise the enforcement mission of the U.S. antitrust agencies. Depending on the base year and deflator used, that calculation would

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<sup>97</sup> U.S. Chamber of Commerce Submission, at 3; NAM Submission, at 4-5 ("The NAM recommends that HSR thresholds be increased automatically on an annual basis commensurate with the gross domestic product deflator."); *see also* USCIB Submission, at 4. It is noteworthy that the fines for violating HSR are indexed to account for inflation, but the dollar values for determining whether a filing is required are not. Specifically, the maximum civil penalty of \$11,000 for each day during which a person fails to comply with the HSR Act is adjusted periodically for inflation. The Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, §31001, 110 Stat. 1321, which amended the Federal Civil Monetary Penalties Inflation Adjustment Act of 1990, requires that civil penalties be adjusted for inflation at least once every four years.

<sup>98</sup> Using 1978 (the year in which the HSR thresholds came into effect) results in a similar jump. Adjusting for inflation using the Consumer Price Index, the \$15 million size-of-transaction threshold would now be about \$37.5 million if measured in 1998 dollars. Increasing the threshold commensurate with the gross domestic product deflator translates into an HSR threshold of \$33 million when measured in 1998 dollars. Data sources: U.S. Dep't of Commerce Bureau of Economic Analysis and U.S. Dep't of Labor Bureau of Labor Statistics.

mean increasing the size-of-transaction threshold in the \$33 million to \$43 million range.<sup>99</sup> Although data are not publicly available for that range, HSR statistics show that raising the threshold to \$25 million or \$50 million would have eliminated approximately 25 to 50 percent of transactions notified in fiscal year 1998.<sup>100</sup>

In 1998 transactions valued below \$25 million raised few competitive concerns. In that year, the agencies received filings on 1,235 transactions valued at \$25 million or less. The agencies issued second requests in only 11 (less than 1 percent) of these transactions. Indeed, in 95 percent of the 1,235 transactions, neither agency sought clearance to even contact the parties.<sup>101</sup> The filing fees alone in the 1,224 transactions in which no second request was issued, however, cost the acquiring parties \$55.1 million.<sup>102</sup>

Likewise, only 27, or just over 1 percent, of the 2,398 transactions valued at \$50 million or less received second requests. Although second-request investigations represented only a small percentage of notified transactions valued below \$50 million, almost 9 percent of all investigated transactions involve transactions valued at less than \$25 million and approximately 20 percent of all investigations involve transactions valued at less than \$50 million, indicating that some small transactions raise sufficient antitrust concerns to warrant a more complete investigation.<sup>103</sup>

If a transaction is not captured by the thresholds, however, the agencies have the authority to investigate and take enforcement action, if needed.<sup>104</sup> For example, in each of the last two years the

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<sup>99</sup> The GDP deflator offers the most representative inflation series because it covers all economic activity. The CPI deflator pertains to a basket of consumer products and thus is less directly applicable to this analysis. Additionally, the CPI may overstate the annual rate of inflation.

<sup>100</sup> FTC and DOJ Annual Report to Congress Fiscal Year 1998, Exhibit A.

<sup>101</sup> *Id.* Of the 1,235 notified transactions valued at \$25 million or less, 196 involved transactions with a foreign acquiring person or foreign acquired entity. A second request was issued in only 2 of the 196 transactions; no enforcement action was taken. Of the 2,398 notified transactions valued at \$50 million or less, 344 involved transactions with a foreign acquiring person or foreign acquired entity. A second request was issued in only 5 of the 344 transactions; no enforcement action was taken. See Annex 2-B.

<sup>102</sup> NAM Submission, at 5-6 (additional costs included attorneys' fees, opportunity costs, and savings lost due to the delay in implementing any efficiencies resulting from the transactions).

<sup>103</sup> FTC and DOJ Annual Report to Congress Fiscal Year 1998, Exhibit A.

<sup>104</sup> The agencies may issue "civil investigative demands" to obtain documents and information necessary to conduct a review of transactions not reportable under the HSR Act, although no bar on closing pending review is imposed. At least one antitrust official in the United States, however, has noted the relative ease with which competition authorities may now monitor pending transactions:

Rarely do the authorities first learn of a merger through the submission of premerger notification. The merger wave of the nineties has been matched by the proliferation of media outlets -- both print



DOJ opened more than 50 investigations of transactions that were not reportable under the HSR Act.<sup>105</sup> Although the agencies contend they have very little ability to detect nonreportable transactions, the Advisory Committee balances that concern with the recognition that only a small fraction of transactions that fall below notification thresholds will pose the threat of competitive harm. Thus, the Advisory Committee concludes that increasing the filing threshold in the \$33 million to \$43 million range should not materially affect the quality of Clayton Act enforcement efforts. Three Advisory Committee members advocate raising the size of the transaction threshold higher, to \$50 million.

*Any efforts to revise notification thresholds must account for the fact that filing fees currently constitute a significant source of revenue for the U.S. antitrust agencies. To ensure that the DOJ and FTC will be able to pursue their enforcement missions vigorously, it is imperative to provide alternative sources of funding to offset the loss of any funds that may result from revision of HSR thresholds. This goal may be accomplished by delinking the fees from the budget and by direct funding from general revenue. If funds are not directly appropriated, alternative funds may be realized in a variety of ways, including raising the filing fee, adjusting the fee based on the size of the transaction, or assessing the fee based on the complexity of the transaction and the amount of work performed by the reviewing agency, although these alternatives would not accomplish delinking the fees from the budget.*

The existing linkage between filing fees and funding for the DOJ and FTC creates a conflict of interest for the agencies and also exposes them to substantial funding cuts if filings were to decrease, as occurred between 1989 and 1991 when filings dropped more than 40 percent.<sup>106</sup> The Advisory Committee is of the view that filing fees should be delinked from funding for the agencies, but that any efforts to do so must occur in an environment where sufficient funds are assured from other sources. This step would be beneficial both for the United States and for those countries around the world that have followed the U.S. lead in implementing filing fees and have linked them to agency budgets.

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and electronic -- that report hints of merger talks. Yet, old reliables, like the Financial Times and the Wall Street Journal, remain good sources of news about potential mergers. The agencies pay attention to these reports and may seek to substantiate them by calls to the companies or to their counselors. The agencies' staffs will also talk to one another on the basis of press reports to make sure that potential reviewing agencies are aware of such reports and can begin to determine whether they will have jurisdiction to review the transaction.

Parisi, IBC Address.

<sup>105</sup> U.S. DOJ Premerger Office. Comparable FTC statistics are not available.

<sup>106</sup> See NAM Submission, at 5; U.S. Chamber of Commerce Submission, at 4-5.



## **Recommendations on Deadlines and Time Frames for Review**

The Advisory Committee commends the flexibility of the U.S. premerger notification system, which permits filing at any time after the execution of a letter of intent, contract, agreement in principle, or public bid. In addition, the Advisory Committee commends the U.S. agencies for concluding their initial review in a maximum of 30 days following notification. Thus, no reform of the U.S. triggering event or initial review period is needed.

More certainty with respect to time frames for the second-stage review process is needed, however. In the United States, the second-stage review process is triggered when a second request is issued prior to the expiration of the initial review period. The merging parties may not consummate the proposed transaction until 20 days (or, in the case of a cash tender offer, 10 days) after they have substantially complied with their respective second requests, which could take several months.<sup>107</sup> The length of the review process thus varies from case to case.

Because the U.S. agencies issue relatively few second requests -- 113 (less than 3 percent of all notified transactions) in fiscal year 1999 -- this discussion pertains to only a minority of all notified transactions. In addition, data submitted to the Advisory Committee by the U.S. agencies indicate that, on average, second-request investigations are resolved in about four months (Box 3-D). For transactions in which second requests were issued but in which the DOJ did not file cases, moreover, the average time to resolution after the issuance of the second request was only two to three months.<sup>108</sup> It is important to note, however, that some second-stage reviews may take up to a year or longer.<sup>109</sup>

Although year-long second-stage review periods constitute a distinct minority of all reviewed transactions, second-stage merger review in the United States is a controversial topic and therefore deserves the attention of both the Advisory Committee and the U.S. antitrust agencies. Among the concerns raised about the second-stage review periods, some parties have suggested the process is open ended and raise concerns about a lack of certainty about when a transaction may be closed. Of course, after a party is in substantial compliance, in all mergers involving unregulated industries (the bulk of all transactions investigated), the agencies are required by statute to complete that investigation in 20 days. That period can only be extended if the parties choose to do so.<sup>110</sup>

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<sup>107</sup> The filing parties may agree voluntarily not to close the transaction for some period of time after the expiration of the waiting period in order to give the parties more time to discuss the competitive significance of the transaction with the agencies or to negotiate a settlement.

<sup>108</sup> Robinson Letter.

<sup>109</sup> In some instances this length results from the parties choosing to delay compliance; in non-HSR transactions it may occur where the additional time does not delay the closing of the transaction.

<sup>110</sup> See e.g., Members of ABA Int'l Antitrust L. Comm. Submission, at 2 (noting that under the U.S. system, "the potential for delay of consummation of a merger is great, and the length of delay is uncertain").

<b>Box 3-D: Average Days to Resolution after Issuance of Second Request<sup>1</sup></b>		
<b>Fiscal Year</b>	<b>Department of Justice</b>	<b>Federal Trade Commission</b>
1995	135.88	92.3
1996	125.42	113.3
1997	153.84	152.2 <sup>2</sup>
1998	112.07	122.3
1999 (to June)	57.68	86.0
Source: Robinson Letter; Baer June 15, 1999 Letter.		
<sup>1</sup> From the date the second request is issued until closing of investigation or issuance of the proposed consent.		
<sup>2</sup> Includes two transactions in which the parties chose not to comply for over two years.		

The Advisory Committee is in accord on the need for certainty in merger review periods. Specifically, Advisory Committee members conclude that merger review be conducted within a reasonable time frame and that the review process should not be open ended. Advisory Committee members were not of a shared view on the appropriate mechanisms for addressing these concerns, however.

One avenue for addressing these concerns lies in the use of fixed maximum review periods. In fact, the data provided by the agencies indicate that the majority of transactions are cleared within reasonable time frames, which suggests that the agencies could (or should be able) to conduct their reviews within fixed maximum review periods (for example, five months following notification, along the lines of the EC). There was a divergence of views among Advisory Committee members, however, regarding whether imposing a fixed maximum review period is advisable.

Proponents of fixed maximum review periods contend that such limits are necessary to provide the certainty and discipline in the merger review process. These members believe that strict deadlines are particularly necessary in a two-stage review process to prevent the second stage from becoming a drawn out affair (discussed in detail below). Many practitioners, including some members of the Advisory Committee, believe that the strict time frames used by the European Commission show that fixed time limits for merger reviews are both feasible and beneficial.<sup>111</sup>

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<sup>111</sup> Rowley and Campbell Submission, at 20.



The majority of members believe that strict fixed time frames would be fraught with risk and extremely difficult to achieve under the U.S. system.<sup>112</sup> For example, unlike the EU system, in which the European Commission decides whether a merger should be permitted, the U.S. agencies do not have the power to block a transaction themselves but must ask a federal court to seek a preliminary injunction. It was observed that, in a system with fixed maximum review periods, merging parties could thwart the U.S. agencies' efforts to review a transaction and to prepare for litigation by refusing to comply with a second request. Although the agencies could impose fines for failure to comply, some Advisory Committee members raised concerns that the agencies' enforcement mission nonetheless could be seriously compromised. Thus, it was recognized that if fixed maximum review periods were imposed, a fixed time frame for responding to the agencies' request for additional information also would be needed. This, however, would eliminate much of the flexibility that parties now enjoy in structuring and implementing their transactions.<sup>113</sup> It also would reduce the time available to negotiate reductions in the scope of second requests and hamper the ability of the agencies to conduct "quick look" investigations. Thus, fixed time frames could increase the burden on parties of complying with second requests.

Even disregarding the specific characteristics of the U.S. system, Advisory Committee members expressed concerns generally about fixed maximum review periods. Fixed time limits could result in enforcement errors. An agency may be forced to act because it ran out of time. This may result in too much enforcement, insufficient enforcement, inappropriate enforcement, or ineffective enforcement, and may impose unnecessary burdens on the parties to a transaction, harm

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<sup>112</sup> Advisory Committee Member David B. Yoffie acknowledged the difficulty of fixed time frames in the U.S. systems, but nonetheless advocates that fixed time periods are necessary to prevent the long delays and potential destruction of value that characterize the existing antitrust review process. On this point Professor Yoffie offers the following perspective:

There is a pattern emerging in large, complicated transactions where antitrust authorities ask for too many documents, and companies procrastinate on delivery or deliver all of the documents (which the antitrust authorities then do not have adequate staff to review). Without a change in process, specifically without a mandate for agencies and merging parties to work on fixed time schedules, it will be difficult to break the current pattern. Particularly in high technology industries, which represent a growing fraction of anti-trust reviews, the current system of open-ended time frames and significant delays are especially problematic. While value can also be destroyed by delays in traditional industries, the long-run implications are potentially even more severe in high technology. Entire product cycle generations in some industries are six-to-nine months. As merger reviews stretch to the length of an entire product generation, and decisions within the merging companies are put on hold pending the merger review, the potential gains from a merger can turn into significant losses, both for consumers and producers.

<sup>113</sup> The FTC informs the Advisory Committee that FTC staff's experience is that parties postpone complying with a second request when it is in their interest to do so, whether to permit resolution of specific antitrust issues or to concentrate on business matters entirely unrelated to antitrust review. The FTC cautions that putting a time limit on investigation would severely restrict the flexibility of the agencies to resolve issues without substantial compliance or to negotiate appropriate relief.



consumers, or both.<sup>114</sup> There also was concern that maximum time periods would effectively turn into minimum or standard review periods.

Based on these concerns, the majority of Advisory Committee members eschew strict time frames but recommend instead that alternative steps be taken to provide the greater certainty required for effective transaction planning. One approach to provide the greater certainty required for effective transaction planning is for the agencies to adopt nonbinding but notional time frames for second-stage review that vary in relation to the relative complexity of the transaction. The agencies should strive to meet these administrative deadlines and should publish the results on a regular basis. The Advisory Committee also notes that review periods might well be shortened if its recommendations for limiting the scope of second requests are adopted (see discussion on information requests below).

The Canadian system has adopted a similar approach. The Canadian Competition Bureau uses “service standards” guidelines. These guidelines identify the maximum turnaround times parties can expect for merger review in Canada. Under the guidelines, the Canadian authority will endeavor to clear a notified transaction in 14 days for noncomplex mergers, 10 weeks for complex mergers, and 5 months for very complex mergers. The five-month review period coincides with the aggregated five-month review period used by the EC for mergers that are subjected to second-phase investigations. The service standards are not binding, and other than the three-year limitation period for challenging a transaction under the Competition Act, there is no legal limit on the length of a Bureau investigation.<sup>115</sup> The Canadian Competition Bureau reports that during the first year in which these service standards were established it met or surpassed the standards in the majority of cases.<sup>116</sup>

Of course, the ability of the agencies to meet such notional timetables will be affected by the conduct of the parties and the time they take to respond to information requests. It is evident that the process may produce opportunities for strategic behavior or gaming on the part of the parties to the transaction that can cause delay. At the same time, the agencies must do what they can to instill discipline and efficiency in the review procedures. As described below, reviewing agencies and

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<sup>114</sup> Remarks by Debra Valentine, General Counsel, U.S. Federal Trade Commission, at ICPAC Committee Meeting (Sept. 11, 1998), at 126 and discussions that followed.

<sup>115</sup> However, the review periods start to run only after the Bureau has received the information deemed necessary to complete an investigation, and this may involve substantially more information than prescribed for a filing under the Competition Act. Complex mergers are defined to include transactions between direct or potential competitors as well as mergers between customers and suppliers where there are indications that the transaction may create or enhance market power. Very complex mergers are those which are likely to create or enhance market power and in which Competition Tribunal proceedings are a strong possibility. Rowley and Campbell Submission, at 20; Competition Bureau Fee Charging Policy, CANADA GAZETTE, PART I, VOL. 131, NO. 44, at 3,446 (Nov. 1, 1997).

<sup>116</sup> Annual Report of the Commissioner of Competition for the year ending March 31, 1999, at 19-20, available at <<http://competition.ic.ca>>.

merging parties can cooperate in several ways to expedite the process. To this end, it was suggested to the Advisory Committee that agency staff and the merging parties should routinely engage in candid and good-faith exchanges regarding the scope of the second request, compliance with the second request, and projected review periods.<sup>117</sup>

### **Recommendations on Focused Information Requirements**

The Advisory Committee commends the U.S. agencies for generally striking the right balance between avoiding unduly burdensome initial filing requirements and maintaining their ability to identify competitively sensitive transactions. The Advisory Committee observes, however, that the second-request process could benefit from adjustment.

#### *Initial Filing and “One and a Half” Requests*

The Advisory Committee believes that with modest exceptions, the HSR filing form requests only the information the agencies need to identify competitively sensitive transactions. Revisions to the HSR form, however, may enhance the agencies’ ability to identify potentially problematic transactions. The FTC has acknowledged, for example, that it sometimes has difficulty identifying from the form the specific products produced by the filing parties.<sup>118</sup> Transactions also may be missed where the parties have not created 4(c) documents or where the documents that exist do not reveal the competitive overlaps, and where the transaction does not have a high enough profile to attract attention from the press or from competitors or customers who might wish to complain.

The FTC has been contemplating changes to the HSR notification form to eliminate requests for information that are not essential to the substantive antitrust review of a reportable transaction and to focus the form more directly on product overlaps.<sup>119</sup> The Advisory Committee encourages the FTC to implement changes to achieve these objectives. In addition, the Advisory Committee recommends that the agencies formalize their current practices that encourage merging parties voluntarily to provide additional information at the initial filing stage in an effort to resolve potential

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<sup>117</sup> New York City Bar Association Committee Submission, at 5.

<sup>118</sup> See Notice of Proposed Rulemaking, 59 Fed. Reg. 30,545 (1994). This can occur because SIC codes are often overly broad or ambiguous so that overlaps are not apparent on the face of the form or because the companies may report in the ordinary course of business under different codes.

<sup>119</sup> According to the FTC’s Premerger Notification Office, the FTC is likely to propose implementing many of the changes first proposed in 1994. See Joseph G. Krauss, Assistant Director, Premerger Notification Office, Bureau of Competition, FTC, New Developments in the Premerger Notification Program, Before the DC Bar Ass’n Antitrust, Trade Regulation and Consumer Affairs Section Antitrust Committee (Oct. 7, 1998); William Baer, *Reflections on Twenty Years of Merger Enforcement Under the Hart-Scott-Rodino Act*, 65 ANTITRUST L.J. 825, 854 (Spring 1997). Another 1994 proposal of particular interest amends the HSR notification and report form to require a listing of the name(s) of any foreign antitrust or competition authority that has been or will be notified of the proposed acquisition. See Notice of Proposed Rulemaking, 59 Fed. Reg. 30,545 (1994).



issues without the need for a second request. One way to formalize the process is to create an optional long form, along the lines of the Canadian short form-long form filing. Another way is to create a model voluntary submission list that identifies the categories of useful data that merging parties could submit in facially problematic cases.

Data provided by the agencies indicate that the voluntary submission of additional information during the initial waiting period does cut back the number of second requests. In fiscal year 1999, the DOJ issued nearly 15 percent fewer second requests than it had the preceding year. In fiscal year 1998, moreover, the FTC issued the same number of second requests (46) as it had in fiscal year 1994, when half as many filings were received.

The U.S. agencies also could formalize the practice of permitting the merging parties to withdraw and refile the acquiring party's HSR form within 48 hours (without having to pay another filing fee) in order to give the agencies additional time to resolve the matter without having to issue a second request. This practice has usefully been employed when the reviewing agency has been unable to clear a transaction within the initial 30-day review period, despite the voluntary provision of additional information. In appropriate cases of this nature, the agencies should alert parties to the option of withdrawing and refiling the HSR notification. In cases in which this mechanism is employed, the agency should endeavor to clear the transaction during the second 30-day period or, if a second request is issued, the second request should be narrowly tailored to those issues identified by the agency as problematic. In addition, publishing statistics on the number of successful (and unsuccessful) attempts to avoid a second request by withdrawing and refiling a notification would demonstrate the viability of this option and alleviate concerns that it would only add an additional 30 days to the process.

In several recent multijurisdictional merger investigations, voluntary information provided at the initial filing stage allowed the FTC to focus its investigations more quickly on the potentially problematic portions of the transactions. In The Seagram Company's acquisition of PolyGram, voluntary early cooperation allowed the FTC to clear the transaction within the 30-day initial review period (Box 3-E). Two other notable examples involve transactions that required second requests, but the companies cooperated so fully that the FTC was able to negotiate and propose consent orders very quickly. The first involved two foreign industrial firms in a \$1 billion transaction. FTC staff quickly identified concerns in two relevant markets, involving fairly sophisticated products and technology. A consent order was negotiated and the FTC approved the proposed consent less than 60 days after the second request was issued. A modest amount of documents was submitted by the parties. A second involved a multibillion dollar merger involving two multinational pharmaceutical firms. The staff reviewed several potential overlap markets and identified one with substantial competitive concerns. The parties negotiated a consent, identified an up-front buyer and the FTC voted out the proposed consent less than 45 days after the second request was issued. Again, only a small number of documents were submitted.<sup>120</sup>

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<sup>120</sup> Baer June 15, 1999 Letter.



### **Box 3-E: The Seagram Acquisition of PolyGram**

The Seagram acquisition of PolyGram in 1998 was a \$10.4 billion transaction that merged the sixth (Universal) and the fourth (Polygram) largest music companies in the world to create the world's largest music company. According to Seagram, the purpose of the merger was to match Universal's relatively strong U.S. business and less-developed international business with PolyGram's strong international presence and weaker U.S. presence. The merger afforded better opportunities for U.S. artists to export their music internationally and for international artists to reach U.S. consumers. Substantial cost savings were also anticipated (and reportedly achieved). The relevant market for antitrust purposes was prerecorded music, whether sold in the form of compact discs, cassettes, or vinyl records. The geographic market was no smaller than a national market. The transaction resulted in a combined market share of approximately 25 percent (in the United States, Europe, and most other major markets), with the four other "major" record companies (Sony, Warner, EMI, and BMG) each having shares between 10 percent and 23 percent, and independent labels as a group accounting for approximately 15-20 percent of sales.

The seriousness of the antitrust issues raised by the transaction was difficult for Seagram to gauge. The combined market share was moderately high but not clearly a problem. In 1983, however, when Warner had attempted to acquire PolyGram, the FTC had investigated and ultimately blocked the transaction when the Ninth Circuit preliminarily enjoined the merger. The combined shares (and the shares of the remaining competitors) in 1983 were virtually the same as the combined shares in 1998. Moreover, at the time Universal launched its bid for PolyGram, several investigations of horizontal agreements among the major record companies were underway in the United States, Europe, and elsewhere. All of these presented concerns for the merging parties.

As it turned out, clearance proceeded smoothly with very few significant problems. Seagram initially had anticipated a five-to-six month period between the announcement of the transaction and closing, driven in part by the time anticipated to obtain antitrust clearance and in part by the time needed to plan the integration of the two companies. Seagram expected a significant investigation in the United States and not much antitrust resistance in the EU or elsewhere. Because of prior FTC enforcement history, Seagram anticipated a second request. Seagram's strategy was to make its HSR filing first in the United States and then to open discussions with the FTC staff immediately in an effort to narrow the issues and possibly avoid a second request altogether. Seagram, crediting experienced FTC lawyers, found the FTC very responsive. The staff was able to eliminate many issues immediately (or with only minimal additional information) and then devote its resources to the tougher issues. In addition to a fairly large group of 4(c) documents, Seagram voluntarily provided strategic plans and other documents to help the FTC get its bearings at the outset. Seagram then met with the FTC staff, including economists, several times and again voluntarily provided information (approximately three boxes in total). Ultimately, the FTC decided not to issue a second request and cleared the transaction within 30 days.

Source: Logan Submission.

### *The Second-Request Process*

Although the HSR system avoids placing undue burdens on merging parties at the initial filing stage, it is by far the most demanding in the second-stage review process with respect to the information and documents that merging parties are required to provide. The Advisory Committee recognizes, however, the flexibility of the U.S. system that enables the agencies and merging parties to resolve issues in many matters with only limited production of documents and information. Data provided by the U.S. agencies indicate that more than half of all firms complied only partially with the second request and that many transactions were resolved with the submission of 50 or fewer boxes of documents.<sup>121</sup>

Many business groups and practitioners that appeared before the Advisory Committee, however, perceive the second-request process to be “unduly burdensome.”<sup>122</sup> The Advisory Committee too is concerned that the data may not indicate the full extent of the burden. For example, even if parties ultimately did not substantially comply with the second request, they may still have undertaken a full document search to be prepared to comply fully with the second request in the event that settlement negotiations break down.<sup>123</sup> In addition, in a handful of notable instances, merging parties have been required to submit hundreds of boxes of documents, multiple gigabytes of computerized data, and extensive answers to dozens of interrogatory questions. These instances fuel the perception of the unduly burdensome nature of the second-request process.

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<sup>121</sup> Data provided by the DOJ indicate that in 1998, merging parties entered into substantial compliance in only 40 percent of the transactions in which second requests were issued. Sixteen percent of second-request transactions were resolved without the production of any second-request documents and 43 percent were resolved with only partial compliance. Robinson Letter. Similarly, during the 15-month period from March 1998 to June 1999, parties to transactions receiving a second request from the FTC entered into substantial compliance in fewer than one in six investigations. Approximately 60 percent of the FTC’s investigations involved document productions of fewer than 20 boxes, and 70 percent involved document productions of fewer than 50 boxes. Baer June 15, 1999 Letter.

<sup>122</sup> ABA Int’l Antitrust Law Committee Members Submission, at 5-6 (“The burdensome nature of the Second Request process is particularly egregious with respect to foreign companies.”); ABA Antitrust Section Multijurisdictional Merger Review Submission, at 22 (“Practitioners and the business community widely perceive Second Requests to be unduly burdensome.”); U.S. Chamber of Commerce Submission, at 5 (“The experience of members of the Chamber has been that the Second Request process as practiced in the United States is extremely burdensome....”).

<sup>123</sup> In other instances, companies have entered into consent decrees because of their desire to avoid the expense and delay generated by the second-request process. See Sennett Submission re the Baxter International Inc./Immuno International AG transaction, at 3. Others allege that “[m]any experienced practitioners believe that the agencies use extensive Second Requests and the delay that they cause to increase their time to build a case and in some cases to create additional leverage to force more divestitures. This is particularly resented by foreigners. The fact is that many experienced practitioners will counsel their clients that if they wish to keep down the amount of assets to be divested, it is important to seize control of the HSR ‘clock’ by substantially complying with Second Requests.” ABA Int’l Antitrust Law Committee Members Submission, at 2.



- In the Halliburton/Dresser transaction, the parties submitted 670 boxes of documents to the Justice Department, whereas they submitted only 4 boxes to the Mexican authorities, 2 to the European Commission, 1 box in Canada (where an ARC was granted) and ½ box each in Australia and Brazil.<sup>124</sup> The DOJ's investigation, however, was conducted simultaneously and cooperatively with an investigation by the EC into the merger. The U.S. enforcement action ultimately obviated the need for the EC to challenge the transaction. Rather, the EC relied on Halliburton's commitment to the DOJ to resolve competitive issues that might have arisen for the EC in the drilling fluids business.
- Materials submitted to the EC during the first phase of its review of the Baxter International Inc./Immuno International AG transaction, including detailed factual submissions, documents, and responses to inquiries for data summaries, totaled 1 box and required approximately 4 weeks to prepare. Materials submitted to the FTC through the "quick look" procedure, including detailed factual submissions, documents, and responses to inquiries for data summaries, totaled approximately 30 boxes and required 9 weeks to prepare. Baxter worked with the FTC staff on a modified "quick look" program because Baxter believed the transaction might not survive lengthy procedural delay in the United States. That is, Baxter "could not risk the time and burdens required to respond to a full 'second request.'" Baxter estimates that if it had completed the entire second-request process, it would have produced in excess of 800 boxes of documents at a cost of \$2 to \$3 million and that the review process would have lasted seven to nine months.<sup>125</sup> According to Baxter, as a result of the staff's cooperation and excellent work, it was able to complete the transaction in a timely manner, but only with a consent order, parts or all of which might have been unnecessary.
- Boeing and McDonnell Douglas together produced approximately 5,000 boxes of documents containing 5 million pages. The FTC also conducted extensive depositions in the fact-gathering stage of its investigation. In contrast, relatively few documents (numbering only in the thousands) were gathered by the EC, which conducted no depositions or interviews of Boeing or McDonnell Douglas witnesses. Although the parties regarded this as "good news" in a sense, they were concerned that the EC authorities must necessarily have relied more on general industry assumptions than on specific evidence in reaching their conclusion.<sup>126</sup>

The Advisory Committee recognizes that these anecdotes do not necessarily reflect the relationship between information requests and other elements of merger review, including the nature and extent of the potential impact of the transaction in each jurisdictions. Likewise, the volume of

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<sup>124</sup> Coleman Submission re the Halliburton/Dresser transaction.

<sup>125</sup> Sennett Submission re the Baxter International Inc./Immuno International AG transaction.

<sup>126</sup> Submission by Benjamin S. Sharp, Perkins Coie LLP, antitrust counsel for Boeing in the Boeing/McDonnell Douglas transaction, in response to Advisory Committee Multijurisdictional Merger Review Case Study questionnaire (March 30, 1999).



documents produced cannot be divorced from the procedures for evaluation, administrative prohibition or litigation, and the appeal in the various jurisdictions.<sup>127</sup> The Advisory Committee believes, however, that it is important for the U.S. agencies to implement measures to address some of the perceived problems. Whether or not the agencies deem the concerns of the business community to be meritorious, the United States will be ill positioned to advocate reform in other jurisdictions until it attempts to address these issues at home.<sup>128</sup> In some cases, the recommendations that follow require little more than improving the transparency of the merger review process. In other cases, they deal with attempts to institutionalize best practices. More generally, the Advisory Committee supports the project of the American Bar Association Section of Antitrust Law to study second-request issues.<sup>129</sup>

The U.S. agencies can take several measures to address perceptions regarding the second-request process. First, the Advisory Committee recommends that when the agencies issue a second request, they give the merging parties their reasons (either orally or in writing) for not clearing the transaction within the initial review period. An explanation of the substantive concerns prompting the second request will facilitate transparency in the merger review process and will help the parties to understand that the second request is based on genuine substantive concerns rather than on strategic motivations.<sup>130</sup>

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<sup>127</sup> Indeed, business and bar association representatives who appeared before the Advisory Committee emphasized that the U.S. review process is “fundamentally sound.” While recognizing some areas may need adjustment, these representatives nonetheless applauded the “efficient and productive work of the Federal Trade Commission and the Antitrust Division of the Department of Justice in the face of a merger wave of unprecedented dimension and duration.” See, e.g., New York City Bar Association Committee Submission, at 1.

<sup>128</sup> See U.S. Chamber of Commerce Submission, at 5 (“Until the United States has attained a heightened level of investigative efficiency, it is ill-positioned to guide the world community as to appropriate practices.”); Members of the Antitrust Law Committee of the ABA Section of International Law and Practice testified at ICPAC Hearings that a refusal of U.S. authorities to change the U.S. system may have a chilling effect on efforts to achieve procedural harmonization: “Other countries are unlikely to coalesce behind the U.S. system due to the burdensome nature of the U.S. process in second stage investigations....The U.S. system also has a chilling effect of efficiency enhancing deals. Because Second Requests impose substantial costs in terms of money and management time, they can and do chill some foreign transactions and cause the structuring of others to exclude U.S. operations. It would be desirable from a policy standpoint to avoid creating undue burdens in mergers that ultimately would be found not to raise a substantive problem.” ABA Int’l Antitrust Law Committee Members Submission, at 1, 4.

<sup>129</sup> The project is composed of practitioners from the private bar and the business community, with the active input and participation of staff members of the agencies.

<sup>130</sup> At the DOJ, recommendations by staff to issue second requests are screened through section management, the Director of Merger Enforcement, and, in some cases, the appropriate Deputy Assistant Attorney General. A similar procedure is followed at the FTC. In many instances, this review results either in a narrowing of the second request or in a decision not to issue it. In FY1999, of the 113 second request investigations, enforcement actions were taken in 76 (roughly 70 percent).

In designing second requests, moreover, the Advisory Committee recommends that the agencies narrowly tailor their requests for additional information to the issues prompting the need for further review. In 1995 the agencies announced that they had addressed concerns about the second-request process by adopting a model second request. The predominant view of ICPAC hearing participants, among others, however, is that this reform helped reduce burdens only marginally.<sup>131</sup> An internal after-the-fact audit of several merger challenges could be useful in identifying the appropriate components of an effective model second request. Such an audit could include at least two different levels of analysis. First, it could consider whether the agencies are requesting the right types of information. In other words, do the agencies use the information they request? Second, the audit could consider the types of information subsequently used at trial. Perhaps the answers to these questions will enable the agencies to refine the model second request.

Merging parties and agency staff frequently are able to negotiate modifications to the scope of second requests. The level of willingness to engage in productive negotiations of this nature appears to vary greatly among staff members and merging parties, however, and modification requests sometimes may not be resolved in a timely fashion. To institutionalize a willingness to engage in productive modification negotiations, the Advisory Committee recommends that the agencies impress on agency staff the importance of being open to negotiating timely modifications to the scope of requests. Success in this endeavor also requires a willingness on the part of merging parties and their advisors.<sup>132</sup>

When modification negotiations break down, parties should be encouraged to use the appeals process.<sup>133</sup> Since its inception in 1995, however, that process has never been used at the FTC and has been used only three times at the DOJ. Practitioners told the Advisory Committee that merging parties were concerned about potential stigma from using the appeals process, the possible delay engendered by the process, and the perception that the decisionmaker is likely to side with the agency (even though in the three DOJ appeals, most issues were decided in favor of the merging parties). Because the agencies want the appeals process to be used, the Advisory Committee recommends that the agencies make the procedure more attractive to merging parties. Commentators have suggested this can be achieved by making the appeals process more expeditious

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<sup>131</sup> ABA Antitrust Section Multijurisdictional Merger Review Submission, at 22-23.

<sup>132</sup> William J. Kolasky, Jr., and James W. Lowe, *The Merger Review Process at the Federal Trade Commission: Administrative Efficiency and the Rule of Law*, 49 ADMIN. L. REV. 889, 891, 907 (1997), submitted by Mr. Kolasky for inclusion in the Advisory Committee record; see also Casey R. Triggs, Deputy Assistant Director, U.S. Federal Trade Commission, *Effectively Negotiating the Scope of Second Requests*, ANTITRUST 36 (Summer 1999).

<sup>133</sup> This is an internal appeal process that parties may use if they believe that they are in compliance with a second request or that compliance would be unduly burdensome, and they have been unable to reach agreement with agency staff on proposed modifications. The procedure allows for a written appeal to the Bureau of Competition director at the FTC and to the deputy assistant attorney general for antitrust at the Department of Justice.



and its outcome more transparent.<sup>134</sup> Further, the agencies should actively encourage merging parties to use the process as well as to involve direct supervisory officials in the modification negotiation process, when necessary.<sup>135</sup>

The Advisory Committee recommends that the agencies attempt to institutionalize these and other best practices to ensure the integrity and effectiveness of the second-request process. The institutionalization of these best practices is particularly important because at least some of the perceived problems identified by the private bar appear to stem from differences in practices by individual staff attorneys. Thus, the agencies at the highest levels should articulate principles or best practices to guide staff during the second-request process and should ensure that procedures are practiced consistently throughout the agencies.

Another issue that requires attention is the reduction of foreign productions and translation requirements. In companies with foreign operations, second requests call for English translations for all responsive documents. At an average cost of \$40 a page word for word (one box is roughly 2,000 pages, thus \$80,000 a box) or \$10 a page for a summary (\$20,000 a box), translation requirements can impose a significant cost on parties with multinational operations.

Over the past three years, however, the FTC has required translation of documents in only five matters. The burden in these cases was reportedly minimal. The FTC typically requests the parties to provide summaries of the documents and then requests full translations of only those documents particularly relevant to the inquiry. In only one investigation in the last three years did the FTC require translation of more than a handful of documents. Likewise, at the DOJ, parties have provided translated documents in only 13 transactions in the last three years. Usually, when parties have asked to provide summaries of documents rather than full translation of all foreign language documents, staff has allowed the parties to do so.<sup>136</sup>

However, the ICPAC hearings testimony stressed that many staff members are unwilling to modify second requests to cut back on translation requirements unless the parties are willing to

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<sup>134</sup> New York City Bar Ass'n Committee Submission, at 5-6.

<sup>135</sup> Recently introduced legislation, S. 1854, 106<sup>th</sup> Cong. (1999), provides for a ruling by a federal magistrate on whether a second request is unreasonably cumulative or duplicative; whether it imposes a burden or expense that substantially outweighs any likely benefit in conducting a preliminary review; or whether the appealing party is in substantial compliance with the second request. It is questionable whether this is a workable solution. Some suggest that a standard of review would be difficult to apply, that the mechanism could be gamed by the parties, and that it has resource implications for the agencies, which would be required to litigate these issues in court. *See* ICPAC Full Committee Meeting (Nov. 19, 1999), Meeting Minutes. *But see* Testimony of Donald I. Baker, Baker & Miller PLLC, ICPAC Hearings (April 22, 1999), Hearing Transcripts, at 192 ("I think that the real weakness in the U.S. system is the absolute lack of any independent force in the process in terms of determining substantial compliance or any other question. Give me a federal magistrate or somebody who you can go into and say, look, this is ridiculous.")

<sup>136</sup> Baer June 15, 1999 Letter; Robinson Letter.



concede that the relevant geographic market is limited to the United States or North America. Testimony suggests that many staff members operate from the perspective that if they have to look at producers abroad, then every aspect of the competitive situation outside the United States is relevant to their investigation. These hearing participants acknowledged that perspective may be appropriate in some cases, but nonetheless contend that foreign operations often are relevant only because the parties are arguing that a price increase in the United States will be defeated by a supply response from foreign producers.<sup>137</sup>

The ICPAC hearings and meetings with antitrust lawyers produced several suggestions to reduce burdensome translation costs where some or all of the company's records are located outside the United States. One approach would permit the parties to produce responsive documents in the original language. The agency would be responsible for employing staff proficient in the relevant language or retaining outside consultants (such as foreign antitrust lawyers) to review the documents and translate only those significant to the issues in the case. Another approach would still leave the translation task to the agencies but impose a higher fixed filing fee where such government translation is required or set a maximum number of pages that a merging party is required to translate, with the government agency having to do the translation beyond that limit.<sup>138</sup> Such a system in which costs of translation are shifted to the agencies or shared with the merging parties is thought to heighten sensitivities to the burdens of translations and encourage a more balanced assessment of when costs should reasonably be incurred.

Given budgetary constraints and the number of foreign languages that are potentially implicated, it is not realistic for the agencies to hire language-proficient staff. Rather, the agencies should continue their current practice of permitting parties, in appropriate cases, to provide summaries of documents and produce full translations only of documents relevant to the inquiry. However, the parties should not as a matter of course be required to forgo a defensible market definition in order to take advantage of this practice. The Advisory Committee recommends that the agencies consider whether the selection of the specifications that apply to foreign offices could be limited to those that are directly relevant to the geographic market or that seek documents that pertain to the specific competitive concern at issue.

### **Multiple Review of Mergers by Antitrust and Sectoral Regulators**

Overlapping responsibilities for merger review in the United States also warrant consideration, in the Advisory Committee's view. A decision by the DOJ or the FTC in a specific transaction does not preclude subsequent or parallel competition reviews, nor does it determine the outcome of such proceedings. Federal and state legislatures and judicial decisions have empowered a wide array of public and private parties to challenge mergers, acquisitions and joint ventures on competition policy

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<sup>137</sup> ABA Int'l Antitrust Law Committee Members Submission, at 2-3.

<sup>138</sup> *Id.*, at 3-4.

grounds. Because shared power may generate inconsistent policy approaches within a single jurisdiction, it can make efforts at global harmonization and cooperation more difficult. In addition, it imposes additional uncertainty as to timing and outcome and further increases transaction costs. The Advisory Committee heard testimony relating to multiple agency review of mergers during its Fall and Spring hearings and at its Advisory Committee meetings on March 17, 1999 and July 14, 1999. The Committee also invited an expert to prepare a paper addressing this issue in the United States.<sup>139</sup>

The majority of Advisory Committee members believe that the overlapping review in the United States is more often than not a defect of the U.S. system and that a more rational or sensible approach would be to give exclusive federal jurisdiction to determine competition policy and the competitive consequences of mergers in federally regulated industries to the DOJ and FTC. Of course, sectoral regulators would continue to be responsible for other public policy considerations that pertain to the regulation of the sector rather than to assessment of proposed mergers from the perspective of competition policy. Other Advisory Committee members agree that the federal antitrust authorities are better positioned to conduct antitrust merger review. These members, however, recommend creating a presumption in favor of the analyses undertaken by the federal antitrust enforcement agencies in parallel or subsequent proceedings.<sup>140</sup> At a minimum, this approach would mean that the analyses are properly weighted in merger decisions by sectoral or state regulators. Other feasible approaches advocated for the short run would encourage soft convergence strategies as well as greater cooperation between agencies that exercise concurrent jurisdiction over mergers.

This section first reviews in greater detail the competition policy system in the United States in merger review and considers the impact of this multiplicity on transaction costs as well as global harmonization and cooperation efforts. It next discusses several cases that shed light on these concerns and considers possible approaches to reducing costs and achieving domestic policy harmonization. Finally, the section highlights several issues relating to overlapping agency review that deserve further study.

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<sup>139</sup> Much of the discussion in this section is drawn from the paper prepared for the Advisory Committee by William E. Kovacic, "The Impact of Domestic Institutional Complexity on the Development of International Competition Policy Standards," (March 15, 1999) [hereinafter Kovacic Submission] and the discussions and deliberations by Advisory Committee members that followed.

<sup>140</sup> On this point Advisory Committee Member John T. Dunlop adds: The five federal agencies listed in Annex 3-B to this chapter were not asked to state their views on this issue to the Advisory Committee. Moreover, the estimation of potential efficiencies, market consequences and effects on national policies are matters in which these agencies have been charged with legislative responsibilities. I have not objected to the antitrust enforcement agencies stating their analyses and views to these agencies in a case and these agencies being required to consider and to respond to the analyses in decisions on mergers in their responsibility. Perhaps further study would propose different policies among these agencies in their relations to the antitrust enforcement agencies. Advisory Committee Co-Chair Paula Stern concurs.



*The U.S. Competition Policy System in Merger Review*

In the United States, several entities have power to challenge a transaction. The DOJ and FTC share authority to review mergers and formulate competition policy. The agencies use a clearance process, based primarily on past experience and expertise, to determine which agency will be responsible for reviewing each proposed transaction.

In several industry sectors, public authorities also are vested with responsibility for formulating and implementing merger policy. Shared authority is most often found in industries that previously have been the subject of comprehensive regulation that governs entry, exit, and rate making. Prominent illustrations are described in Annex 3-B.

State attorneys general also enjoy power to review individual transactions on competition policy grounds. Acting under federal or state antitrust laws (or both), individual states may challenge mergers as anticompetitive. States have participated in several investigations with the DOJ and FTC; entered into settlement agreements along with the DOJ or the FTC or in separate consent decrees following joint federal-state investigations; and investigated and obtained consent decrees in transactions in which neither the DOJ nor the FTC participated.<sup>141</sup>

In addition to public enforcement, private parties also have the power to challenge mergers. Competitors, takeover targets, customers, and suppliers of the merging parties all have lodged formal challenges, although Supreme Court decisions place formidable standing hurdles in the path of competitors and takeover targets. Nonetheless, challenges by rivals remain a possibility, as demonstrated by a number of successful efforts by rivals to enjoin transactions.<sup>142</sup>

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<sup>141</sup> Ilene Knable Gotts and Phillip A. Proger, *Hot Topics in Antitrust Review of Transactions*, THE M&A LAWYER, May 1999 [hereinafter Gotts and Proger]; Fox & Fox, CORPORATE ACQUISITIONS AND MERGERS, Chapter 17 at §17.03 (Bender 1999)[hereinafter Fox & Fox]. The HSR Act, however, does not provide states with any express role in the federal premerger review process or with rights to HSR Act filing information. In 1985 the United States Courts of Appeals for the Second and Fifth Circuits both held that the HSR Act confidentiality provision prohibited the FTC (and, by extension, the DOJ) from granting state antitrust officials access to HSR Act filings and documents generated by the FTC in connection with two separate oil company mergers. *See Lieberman v. FTC*, 771 F.2d 32 (2d Cir. 1985); *Mattox v. FTC*, 752 F.2d 116 (5<sup>th</sup> Cir. 1985). Partly in reaction to the *Mattox* and *Lieberman* decisions, state attorneys general began seeking alternative ways of obtaining access to premerger filings. The states and the federal antitrust agencies have developed cooperation agreements that promote cooperation in reviewing transactions of common interest.

<sup>142</sup> *See* Fox & Fox, Chapters 6, 7A, 21. Successful challenges may be attributable, in part, to intervention-oriented substantive standards developed in Supreme Court cases of the 1960s. Although subsequent Supreme Court decisions dealing with nonmerger antitrust issues have cast doubt upon the continued vitality of the merger jurisprudence of the 1960s, the Supreme Court has never repudiated its earlier merger rulings. As there has been no Supreme Court decision involving substantive merger standards since 1975, the older precedents remain fair game for litigants and may constitute a starting point for analysis by the lower courts. Kovacic Submission, at 2-3, 9-10.



No other legal system in the world distributes decisionmaking power for competition policy issues so widely.<sup>143</sup> Still, overlapping competition policy regimes in other countries pose problems.<sup>144</sup> In other countries conflicts arise between multinational regional competition policy regimes and the antitrust laws of individual member states;<sup>145</sup> the operation of national competition regimes and sectoral regulatory frameworks;<sup>146</sup> decisions by national competition authorities and regional competition policy bodies;<sup>147</sup> and national competition authorities who share power to review mergers.<sup>148</sup> These features may hinder the ability of national governments to establish common policies and procedures within their own borders, and as a result, with their foreign counterparts.

### *Impact of Multiplicity*

The Advisory Committee recognizes that Congress has vested sectoral regulators with competition policy oversight and charged these government agencies with concurrent jurisdiction to pursue different (and perhaps conflicting) goals. Nonetheless, the Advisory Committee believes that the costs resulting from this multiplicity must be considered. From an industry participant's perspective, in theory, such costs might include the uncertainty generated when multiple entities possess the authority to review the competitive effects of a transaction or practice, but reach differing conclusions on this issue; the increased transaction costs flowing from the need to defend a proposed transaction before multiple agencies; and the uncertainty created by the agencies' different time frames for review. From the agencies' perspective, agencies suffer when the duplicative expenditure of resources inherent in concurrent jurisdiction creates an inefficient allocation of scarce resources, particularly when the specialized agency is not bound by the recommendations of the competition agencies with respect to an assessment of competitive effects. Further inefficiencies (and perhaps

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<sup>143</sup> See William E. Kovacic, *The Influence of Economics on Antitrust Law*, 30 ECON. INQUIRY 294, 295 (1992) (describing decentralization of prosecutorial power under U.S. antitrust laws).

<sup>144</sup> Kovacic Submission, at 25-26.

<sup>145</sup> See, e.g., Testimony of Karel Van Miert, then-European Competition Commissioner, ICPAC Hearings (Nov. 2, 1998), Hearing Transcripts, at 54-55 (testifying to the problem of review of airline alliances in the EU).

<sup>146</sup> In the past two years, Germany has liberalized its postal services and telecommunications sectors and has created a new institution to perform residual regulatory tasks (such as setting access prices for bottleneck facilities). The legislation creating the new independent regulatory body does not clearly define the respective competition policy roles of the German Federal Cartel Office and the independent regulator. This ambiguity has led to disputes between the FCO and the regulator concerning a variety of competition policy issues. Kovacic submission at 25.

<sup>147</sup> See Roger Alan Boner & William E. Kovacic, *Antitrust Policy in Ukraine*, 31 GEO. WASH. J. INT'L L. 1, 8-10 (1997) (describing broad distribution of decisionmaking power among national and regional competition officials in Ukraine).

<sup>148</sup> See Michael G. Cowie & Cesar Costa Alves de Mattos, *Antitrust Review of Mergers, Acquisitions, and Joint Ventures in Brazil*, 67 ANTITRUST L.J. 113 (1999) (describing difficulties that arise from the distribution of antitrust merger oversight authority across three institutions of the national government in Brazil).

bad policy) can be created when one agency has the ultimate authority to make decisions that fall within another agency's area of comparative advantage.<sup>149</sup>

Shared power for making and implementing competition policy also may impede reform efforts designed to achieve substantive harmonization and convergence. The multiplicity of competition policy agents complicates efforts to establish consistent enforcement policies and procedures within a single country. That is, international discussions about procedural and substantive harmonization often assume that individual nations have harmonized such processes and standards within their own borders. For example, when the Advisory Committee speaks of attaining convergence of initial review periods, it tends to assume that the United States has consistent procedures regarding notification and review among the reviewing agencies.

Multiplicity also may impede effective cooperation in individual transactions. This is evident where two or more independent institutions exercise overlapping authority, but no hierarchy of authority makes the decision of one actor binding on the other institutions. The U.S. federal antitrust authorities can cooperate in an investigation with their antitrust counterparts in other jurisdictions and reach a common settlement with the merging parties but must await the decision of sectoral regulators in the same matter. Whereas the U.S. antitrust enforcement agencies have developed close cooperation with a number of its foreign counterparts, there is no effective mechanism by which foreign competition authorities can share information and views with the sectoral regulators in the same way that they share information and views with their antitrust counterparts.<sup>150</sup> In addition, this circumstance may create the perception that the DOJ and the FTC lack the ability to speak authoritatively to foreign governments about a particular transaction or U.S. competition policy in general because their pronouncements do not bind sectoral regulators, who independently exercise policymaking power over a wide range of business activity.

Distributing competition policy power across multiple gatekeepers who can examine (and challenge) specific conduct also may make the grounds for individual decisions less transparent. The

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<sup>149</sup> See James F. Rill, et al., *Institutional Responsibilities Affecting Competition in the Telecommunications Industry, A Practicing Lawyer's Perspective*, European University Institute, 1998 EU Competition Workshop, at 24.

<sup>150</sup> For example, the 1991 U.S.-EC Cooperation Agreement only foresees cooperation with the Department of Justice and the Federal Trade Commission (Article 2B of the agreement defines "competition authorities" as meaning: (i) the European Commission and (ii) the Antitrust Division of the DOJ and FTC). It would therefore appear that other federal agencies, for example, the DOT, which has the ultimate discretion to determine whether an application meets the statutory prerequisites for the granting of antitrust immunity, do not constitute a competition authority within the meaning of the agreement. As a consequence, cooperation may be more limited in the review of, for example, global airline alliances. See Reynolds Submission, at 18. Indeed, Fernando Sanchez Ugarte, President of the Federal Competition Commission in Mexico testified at the ICPAC hearings in November that his agency did not have the opportunity to participate as much as it wanted to; first, before the Department of Justice, and secondly, before the Surface Transportation Board in their review of the Union Pacific/Southern Pacific merger. Testimony of Fernando Sanchez Ugarte, President, Federal Competition Commission, ICPAC Hearings (Nov. 2, 1998), Hearings Transcript, at 209-210.



multiplicity of reviewing bodies and the use of different standards for judging mergers makes it difficult for foreign firms to understand the merger review process. This may have the cumulative effect of decreasing transparency. This possibility is strongest where sectoral regulators, acting under the mandate of broad “public interest” standards, account for competition policy concerns in exercising their jurisdiction over mergers.<sup>151</sup> Sectoral regulators often have authority to take into account social welfare considerations that extend beyond the traditional focus of antitrust analysis. In many instances it may be difficult to determine whether traditional antitrust concerns or social welfare objectives motivated the sectoral regulators’ decision to intervene.<sup>152</sup>

The United States also may have difficulty encouraging foreign governments to cure imperfections in their competition policy rules and procedures unless it first addresses the institutional complexity of the U.S. system.<sup>153</sup>

### *The Magnitude of the Problem*

The Advisory Committee considered several cases that shed light on these concerns. The costs of multiplicity for merger policy are most apparent in industries undergoing the transition from comprehensive public utility regulation to competition. While this summary does not purport to be a comprehensive review of the agencies’ record, experience in the telecommunications sector provides several illustrations.

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<sup>151</sup> Sectoral regulators, such as the FCC, have not issued guidelines indicating how they perform competition policy analysis under a public interest standard, although the Federal Energy Regulatory Commission has done so for mergers in the electric power sector.

<sup>152</sup> An additional concern is that sectoral regulatory agencies also are vulnerable to capture by industry and generally more susceptible to political influence compared with the DOJ. *See* Statement of Sen. Bob Kerrey (D-Neb), 141 CONG. REC. S8194 (daily ed. June 12, 1995) (“[The FCC is] vulnerable to political pressure—a lot more vulnerable than the Department of Justice”); *see also* See OECD, Directorate for Financial, Fiscal and Enterprise Affairs Committee on Competition Law and Policy, *Relationship between Regulators and Competition Authorities*, DAF/CLP (99)8, 10 (June 24, 1999), *reprinted in* OECD JOURNAL OF COMP. LAW & POLICY, Vol. 1, No. 3 (Sept. 1999) (“When dividing tasks between competition agencies and sector-specific regulators, attention must also be paid to the potential for each type of institution to fall prey to regulatory capture, and problems inherent in subjecting competing firms to different sector-specific regulation”).

<sup>153</sup> Many of these same issues also arise in overlapping state review of mergers. The states have challenged mergers at thresholds more stringent than those applied by federal authorities, have given decisive effect to concentration data, and used their enforcement power to block business restructurings that would reduce employment within their borders. Indeed, National Association of Attorneys General, *Horizontal Merger Guidelines* (1993), *reprinted at* 4 Trade Reg. Rep. (CCH) ¶13,406, consider non-competition factors, including the need to protect small local businesses. *See* Kovacic Submission, at 21-23; *see also* ABA Int’l Antitrust Law Committee Members Submission, at 7-12 (the policies of the National Association of Attorneys General (NAAG) toward mergers are more restrictive than the policies of the federal antitrust agencies). Further, criticism has been levied that states opting out of the federal-state protocol have issued burdensome information requests calling for all documents provided to other states (that is, all HSR material) plus additional requests. *See, e.g.*, Testimony of Phillip A. Proger, Jones, Day, Reavis & Pogue, ICPAC Hearings (April 22, 1999), Hearings Transcript, at 70.



FCC COMMISSIONER STATEMENTS. At least two members of the Federal Communications Commission (FCC) and other public officials have publicly expressed their concern over the seemingly duplicative jurisdiction of the Antitrust Division and the FCC during telecommunications merger reviews.

- Commissioner Michael Powell, in a separate statement regarding FCC approval of the WorldCom/MCI transaction, stated that the FCC should focus its efforts on areas of its own expertise and strive to eliminate duplication of work with DOJ.<sup>154</sup>
- Commissioner Harold Furchtgott-Roth also was concerned about the “cumbersome review process” in the WorldCom/MCI matter. “The heroic efforts of our staff notwithstanding, we have little to add or to subtract from the market analyses or the judgment of this other federal agency but a more detailed public record,” he wrote in a separate statement.<sup>155</sup>
- In a recent op-ed piece in the *Wall Street Journal*, Commissioner Furchtgott-Roth argued that the FCC’s authority over merger review had become too broad and without the necessary limits and standards.<sup>156</sup>
- Senator Conrad Burns publicly criticized the analysis the FCC has employed as duplicative of the merger analysis performed by the DOJ.<sup>157</sup> This criticism has been made of the Surface Transportation Board (STB) as well.<sup>158</sup>

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<sup>154</sup> Separate Statement of FCC Commissioner Michael Powell Regarding the Application of WorldCom, Inc. and MCI Telecommunications Corp., CC Dkt. No. 97-211, at 4 (Sept. 14, 1998).

<sup>155</sup> Separate Statement of Commissioner Harold Furchtgott-Roth, Regarding Application of WorldCom, Inc. and MCI Communications Corp., CC Dkt No. 97-211, at 1 (Sept. 14, 1998) (also alleging that overlapping review contributes to the lengthiness of the merger review process).

<sup>156</sup> Harold Furchtgott-Roth, *The FCC Racket*, WSJ INTERACTIVE EDITION (Nov. 5, 1999). *But see* Statement of Commissioner Susan Ness, FCC, on Mergers and Consolidations in the Telecommunications Industry before the Committee on the Judiciary, U.S. House of Representatives (June 24, 1998) (While mindful that having both the FCC and DOJ involved in merger review creates a potential for additional costs and delays, Commissioner Ness nonetheless contends that “the FCC and Justice Department can both play constructive roles, avoid unnecessary duplication and delays, build public confidence, and produce better outcomes.”).

<sup>157</sup> *See Sen. Burns Says FCC is Duplicating DOJ Antitrust Enforcement in Radio Sales*, COMMUNICATION DAILY, Feb. 20, 1997.

<sup>158</sup> *See* Frank N. Wilner, *Belly of the Beast, Blame the Shermans*, ABI/INFORM, Vol. 21, No. 3, at 72 (Summer 1998) [hereinafter Wilner] (the former chief of staff to Vice Chairman of the Surface Transportation Board argued that the competition analysis performed by the STB inappropriately applies noncompetition standards when evaluating mergers).

CASE SPECIFIC EXAMPLES. During the past several years, several instances also have emerged where the regulatory agency did not follow the DOJ's competitive analysis of a transaction.

- In the Burlington Northern, Inc./Santa Fe Pacific Corp. merger, the Interstate Commerce Commission decision rejected the comments submitted by the Antitrust Division, warning that if the merger proceeded without necessary conditions, competition would be lessened in several markets.<sup>159</sup>
- In the merger between Union Pacific Corporation and Southern Pacific Rail Corporation, the DOJ argued that the merger should not go forward because it would result in a monopoly in several markets and create a rail duopoly throughout the West. Despite that vigorous opposition, the Surface Transportation Board approved the merger.<sup>160</sup> Criticism has been levied that the STB failed to take into account the view of the DOJ.<sup>161</sup>
- The Department of Transportation approved an alliance of Delta Airlines, Swissair, Sabena Airlines, and Austrian Airlines despite concerns expressed by the DOJ about competitive effects in four New York city-pair markets.<sup>162</sup>
- In 1997, the DOJ allowed the merger of Bell Atlantic and NYNEX to proceed without adjustments.<sup>163</sup> The FCC separately reviewed the merger and imposed various competition-related restrictions in reaching a settlement with the parties. Although the FCC's public interest standard includes social welfare considerations, the tone and content of the FCC's opinion allowing the merger subject to conditions suggests that the FCC reached different conclusions than the DOJ concerning possibilities for actual and potential competition between the companies.<sup>164</sup> The

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<sup>159</sup> 10 I.C.C. 2d 661 (Aug. 16, 1995).

<sup>160</sup> Remarks by Anne K. Bingaman, then-Assistant Attorney General, Antitrust Division, U.S. Dep't of Justice, Statement on the Surface Transportation Board's Approval of the Union Pacific and Southern Pacific Merger (July 3, 1996).

<sup>161</sup> See Wilner ("[T]he STB needs to give the [DOJ's] opinion no more weight than they give to a handscrawled letter submitted by bitter widow Jones whose husband died in a train wreck").

<sup>162</sup> See *Joint Application of Delta Airlines, Inc., Swissair, Sabena S.A., Sabena Belgian World Airlines, and Austrian Airlines for Approval of and Antitrust Immunity for Alliance Agreements*, Dep't of Transportation Order 96-6-33 (June 14, 1996).

<sup>163</sup> See U.S. Dep't of Justice Press Release, Antitrust Division Statement Regarding Bell Atlantic/NYNEX Merger (Apr. 24, 1997) (announcing decision not to challenge merger).

<sup>164</sup> See *In the Applications of NYNEX Corporation Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, 1997 FCC LEXIS 4349, at \*20 (Aug. 14, 1997).

FCC's review of recent transactions involving AT&T/TCI, Bell Atlantic/GTE, and SBC/Ameritech also has stimulated a debate about the appropriate division of labor between the FCC and the DOJ.<sup>165</sup>

*Possible Approaches to Reducing Costs and Achieving Domestic Policy Harmonization*

Although the evidence on the record was neither exhaustive nor conclusive, Advisory Committee members think overlapping review in the United States is a serious matter warranting reform. In the course of deliberations, the Advisory Committee considered a variety of proposals for achieving consistency in analytical methods and processes within the United States. These proposals ranged from granting exclusive federal jurisdiction to determine competitive consequences of mergers in federally regulated industries to the DOJ and FTC, to clarifying the roles of the DOJ, the FTC, state, and federal sectoral regulators in merger review, to imposing timetables and deadlines on the merger review processes, to nonlegislated convergence strategies.

Maintaining the status quo also is, of course, an option.<sup>166</sup> Any proposed solution to the problem of overlapping merger review authority must fully take into account the benefits of the current system. Some have suggested that concurrent review deals with the problems of underenforcement.<sup>167</sup> Another benefit is that review by multiple agencies allows more than just competition issues to be taken into account. Although some individuals consider this feature to be a drawback, the status quo does allow sectoral regulators, who may have more experience dealing with certain industries, to play a leading role in the merger review process and include competition policy in the mix of factors considered.

CLARIFYING THE ROLES OF FEDERAL REGULATORS. One path for legislative change is to simplify the merger review process by clarifying the roles of the DOJ, the FTC and the federal sectoral regulators in merger review. One approach for simplification is to make the DOJ and FTC mere advisors to the sectoral regulators for matters in which the antitrust agencies and the sectoral regulators now share power.<sup>168</sup> This, of course, would be weakening the role of the federal antitrust

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<sup>165</sup> See Kovacic Submission, at 24.

<sup>166</sup> Rationales offered in support of multiple agencies with overlapping duties, including multiple federal review of mergers, are interagency competition, diversification, and institutional comparative advantage. See Kovacic Submission, at 10-20.

<sup>167</sup> Remarks by Deputy Assistant Attorney General Douglas Melamed, ICPAC Committee Meeting (Mar. 17, 1999), Meeting Minutes at 39-40.

<sup>168</sup> One expert contends that U.S. experience with entrusting federal merger oversight powers exclusively to sectoral regulators has not been edifying. This expert points to noteworthy examples of seemingly failed experiments with this approach, including DOT's review of airline mergers in the 1980s and the Surface Transportation Board's assessment of railroad mergers in the 1990s. "Sectoral regulators have demonstrated a tendency to overlook important competition policy concerns, partly out of limitations on relevant expertise and partly out of institutional perspectives that de-



agencies. Alternatively, and more in line with the view of the Advisory Committee, there is much to be said for removing the competition policy oversight duty from the sectoral regulators and vesting that power exclusively in the federal antitrust agencies. Under such a regime, the findings of the federal antitrust agency on the competition issues would be reported to and binding upon the specialized agencies. This approach would align competition policy assessments of mergers involving previously regulated firms with the same standards that apply to firms in other areas. Another benefit of placing competition policy authority solely in the antitrust agencies is greater transparency. Sectoral regulators would be forced to make clear their reliance on noncompetition factors (such as social and economic policies) when reviewing a proposed transaction.

**CLARIFYING THE ROLES OF STATE REGULATORS.** The topic of state merger enforcement has been the subject of extensive debate in the academic literature and public policy circles. Some commentators contend that federal preemption of competition policymaking by state regulators is appropriate for the same reasons mentioned above for preempting competition policy review by federal sectoral regulators. If such preemption does not take place, it is argued, federal antitrust regulators will be unable to establish unified national merger principles unless they accommodate the preferences of state governments. That would not only add a great deal of uncertainty to merger policy but also place continuing pressure on federal officials to resist measures that would narrow the scope of enforcement activity.<sup>169</sup> Others question the need for such preemption at this time. As a recent analysis describes, state attorneys general have not been regularly investigating and challenging mergers where the markets are national or international in scope (as opposed to mergers involving foreign companies that control significant retailing operations in a reviewing state).<sup>170</sup> Rather, industries that function on a separate “local market” basis have attracted the most state scrutiny.<sup>171</sup>

**IMPOSING DISCIPLINE ON REVIEW PROCESSES.** A number of commentators (as well as public officials) have suggested that strict timetables and deadlines for review by sectoral regulators be implemented and rigorously enforced.

**NONLEGISLATED CONVERGENCE STRATEGIES.** As an alternative to those approaches, all of which would require legislation to implement, public officials could pursue a variety of soft convergence strategies to achieve greater consistency and simplicity in competition policy for mergers. These strategies generally involve encouraging the adoption of common analytical

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emphasize competition as a factor for evaluation. There is little evidence in modern U.S. regulatory history that supports a measure that would dedicate all merger oversight duties at the federal level to the sectoral regulator.” Kovacic Submission, at 28.

<sup>169</sup> *Id.*, at 29; *see also* ABA Int’l Antitrust Law Committee Members Submission, at 7-12.

<sup>170</sup> ABA Int’l Antitrust Law Committee Members Submission, at 10-11.

<sup>171</sup> Gotts and Proger.

methods. Possibilities include creating working groups of representatives of public institutions that review mergers, holding conferences at which representatives of all private and public sector constituencies address policy consistency questions, and encouraging public bodies to issue guidelines that delineate their enforcement intentions (or preferably, adopt FTC-DOJ Guidelines). Identifying differences among reviewing bodies in competition policy methodologies would make existing processes and standards more transparent and could stimulate discussion and adjustments.

This type of approach has been undertaken in the past. For example, in 1994, there was an Interagency Task Force on Bank Competition, chaired by the DOJ and composed of the senior staff from the various banking agencies: Office of the Comptroller of the Currency, Office of Thrift Supervision, Federal Reserve Board, Treasury Department, and the Federal Deposit Insurance Corporation. The mandate of the task force was to identify the common principles of bank competition. The task force met monthly to discuss a highly organized agenda. The end result was a set of interagency bank merger screening guidelines, which were issued in July 1994. The task force also produced a bibliography and an overview of the discussions, which addressed similarities and differences in the agencies' approaches to issues, data, and information in the bank merger process. This pilot study might serve as a useful model for other sectoral task forces. It is also an example of what could be done to get the relevant international agencies together to discuss and agree on common principles and issues and review key aspects of theory, application, or enforcement.

In addition, provided *ex parte* rules are not implicated, many of the recommendations to facilitate cooperation and harmonization among antitrust authorities in the multijurisdictional merger review process also could be applied to agencies with concurrent jurisdiction in the domestic context, including enhanced information sharing and an exchange of staffing resources. A great deal of cooperation already takes place today between the DOJ and FTC and the states pursuant to a Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and State Attorneys General. As described more fully in Chapter 2, this protocol sets forth a general framework for the conduct of joint federal-state investigations with the goals of maximizing cooperation between enforcement agencies and minimizing the burden on private parties.<sup>172</sup>

To some extent cooperation also occurs between the federal antitrust enforcement agencies and at least one sectoral regulator, the Department of Defense (DOD). The DOJ works closely with the DOD in reviewing defense mergers, with the DOD playing a unique role as the primary (and often only) U.S. consumer for defense industry products. As one DOJ official noted: "After you make a premerger notification filing, you can expect that Antitrust Division staff [and staff from the Office of the Secretary of Defense] will work closely to review it. When the Antitrust Division learns about a transaction we . . . do not terminate that initial review until the Department of Defense signs off on it. When a more detailed investigation is justified, the two agencies jointly investigate

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<sup>172</sup> Protocol For Joint Federal/State Merger Investigations (Mar. 11, 1998), *reprinted at*, 6 Trade Reg. Rep. (CCH) ¶13,420.



it....The cooperation between antitrust and the [Office of the Secretary of Defense] staffs likely assures that the United States government will speak with one voice on defense mergers.”<sup>173</sup>

### *Recommendations and Issues for Further Study*

The Advisory Committee is of the view that the federal antitrust authorities are better positioned to conduct antitrust merger review than federal sectoral regulators.<sup>174</sup> The majority of Advisory Committee members recommend removing the competition policy oversight duty from the sectoral regulators and vesting such power exclusively in the federal antitrust agencies. Under such a regime, the findings of the federal antitrust agency on the competition issues would be reported to and binding upon the specialized agencies.<sup>175</sup> At this juncture, however, some Advisory Committee members recommend instead creating a presumption in favor of the analyses undertaken by the federal antitrust enforcement agencies in parallel or subsequent proceedings. Additional approaches advocated in the short run consist of encouraging soft convergence strategies including greater cooperation between agencies that exercise concurrent jurisdiction over mergers.

With respect to overlapping state review, the Advisory Committee encourages the state attorneys general to resist using the antitrust laws to pursue noncompetition objectives. Further, the Advisory Committee recommends that the federal antitrust enforcement agencies file an amicus curiae brief in state court in select private suits challenging international transactions. For example, appropriate cases may be challenges of transactions that the DOJ or FTC has either cleared or settled where there has been significant cross-border cooperation or the parties granted waivers of confidentiality.

All of the Advisory Committee members agree that several issues relating to overlapping agency review deserve further study. Among these issues are: How does the specialized agency (and state) process differ from the antitrust agency review process? In what ways do the substantive standards of review differ (for example, what noncompetition factors are taken into account)?

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<sup>173</sup> Robert Kramer, Chief, Litigation II Section, Antitrust Division, U.S. Department of Justice, Antitrust Considerations in International Defense Mergers, Presentation before the American Institute of Aeronautics and Astronautics, at 9 (May 4, 1999).

<sup>174</sup> According to one expert, an assessment of the institutional capability of sectoral regulators and the federal antitrust agencies to perform competition policy assessments would show that the sector regulators have a great distance to travel before they approximate the skills of the antitrust agencies. In recent years, both the FCC and FERC have attempted to bolster their analytical capability by hiring highly respected competition policy specialists. Each agency has established bureaus that specialize to a large degree in competition policy issues. Yet the antitrust agencies remain decidedly preeminent in their capacity to examine competition policy questions in the communications and energy sectors. Only significant increases in resources and experience would enable the FCC or FERC to match the skills of DOJ and the FTC in this field. See Kovacic Submission, at 24.

<sup>175</sup> Making the federal antitrust agencies' conclusion about the likely competitive effects of a proposed transaction binding may not be outcome determinative where such assessment is only one of many factors considered in the decisionmaking process.



Would a unified solution be appropriate or do the agencies present different challenges or different problems? The Advisory Committee's hearings record includes anecdotal discussions of concerns, but it does not exhaustively review the track records of interactions and conflicts between the relevant agencies. The historical record of agency interaction is crucial to understanding the extent of the problem posed by overlapping merger review authority. To develop this record, postmerger audits could be conducted on those matters where the federal competition agencies came to different conclusions or opposed a transaction that was subsequently approved by another regulator. Such a study should also assess the capacity of those agencies, apart from the DOJ and the FTC, that undertake competition analyses to conduct competition review and whether and to what extent these reviews duplicate the efforts of the DOJ and FTC. A related issue is whether the DOJ and the FTC have the necessary expertise to undertake merger analysis across different industries.

Certainly any proposed solution to the problem of overlapping merger review authority must fully take into account the ramifications of costs and benefits of a change to the status quo. For example, does concurrent review deal with problems of underenforcement? Does a competition analysis by the sectoral regulators temper the use of noncompetition related factors? Should competition policy be part of the mix of factors to consider, or by its elimination, would it be diminished?

Additionally, any solution would have to take into account the position of the other reviewing agencies. Toward this end, a dialogue might usefully take place among the DOJ, the FTC, and other state and federal agencies responsible for merger review in order to learn the views of the agencies and state regulators toward the possible approaches.

Further examination of the experience in other jurisdictions with local and national bodies that set competition policy could prove useful as could further study of the work undertaken by international organizations, such as the OECD, with respect to overlapping merger review authority.<sup>176</sup>

#### SUMMARY OF RECOMMENDATIONS

##### **Casting the Merger Review Net Appropriately: Notification Thresholds**

1. In establishing its premerger notification thresholds, each jurisdiction should seek to screen out mergers that are unlikely to generate appreciable anticompetitive effects within the reviewing jurisdiction.

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<sup>176</sup> See, e.g., OECD, Directorate for Financial, Fiscal and Enterprise Affairs Committee on Competition Law and Policy, *Relationship between Regulators and Competition Authorities*, DAF/CLP (99)8, 10 (June 24, 1999), reprinted in OECD JOURNAL OF COMP. LAW & POLICY, Vol. 1, No. 3 (Sept. 1999).

- This can be accomplished, first, by implementing threshold tests that include an *appreciable nexus to the jurisdiction*, such as transaction-related sales or target assets in the jurisdiction.
  - Second, jurisdictions should set notification thresholds *only as broadly as necessary* to ensure the reporting of potentially problematic transactions. The Advisory Committee recommends that each jurisdiction consider whether its notification thresholds are too low and require the reporting of too many nonproblematic transactions. Low notification thresholds may result from a failure to adjust notification thresholds to reflect the effects of inflation or increases in the value of companies as measured by stock market valuation. If an indexing mechanism is not employed, the Advisory Committee recommends that jurisdictions review their notification thresholds periodically (at least every four years) to determine whether they should be adjusted.
2. Additional steps that can be taken at this stage to reduce costs for international mergers include establishing *objectively based notification thresholds*.
  3. Jurisdictions also should ensure their merger regimes are transparent in general. Particular efforts to improve transparency should include identifying notification thresholds, clarifying the manner in which those thresholds should be applied, and providing information on how to comply with premerger filing requirements.
  4. To better ensure that potentially anticompetitive transactions do not escape scrutiny under merger review systems, the Advisory Committee recommends that competition authorities should be given the authority to pursue potentially anticompetitive transactions even if they do not satisfy premerger notification thresholds. Although the federal antitrust agencies in the United States already possess this authority, many existing merger regimes authorize regulators to review transactions only when premerger notification requirements are satisfied.
  5. Any efforts to revise notification thresholds also must consider the fact that filing fees currently constitute a significant source of revenue for numerous competition authorities, including the federal antitrust agencies in the United States. Ideally, no competition agency should be dependant on filing fees for its budget, staff salaries, or bonuses. To ensure that these competition authorities will be able to pursue their enforcement missions vigorously, it is imperative to provide agencies with alternative sources of funding to offset the loss of any funds that may result from revision of notification thresholds or “delinking” filing fees.

<b>Reducing Burdens on Transactions that Come within the Merger Review Net</b>
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To ensure that each jurisdiction refrains from unduly burdening those transactions during the course of the merger review process, merger review should be conducted in a two-stage process

designed to enable enforcement agencies to identify and focus on transactions that raise competitive issues while allowing those that present none to proceed expeditiously.

### **Review Periods and Timing**

1. The first stage should occur within one month or 30 days following notification. ICPAC hearings testimony suggests that marginal differences in the initial review periods are inconsequential because they are manageable from a transaction planning standpoint. Reform efforts should focus, therefore, on jurisdictions in which the initial review period substantially exceeds one month or is undefined. Jurisdictions that are unable to terminate investigations before the expiration of the initial or second-stage review periods also should be given the authority to grant early termination (for example, for transactions that raise no substantive issues or in which the parties are willing to resolve concerns through consent decrees or undertakings).
2. To permit merging parties to coordinate multijurisdictional filings in the most efficient manner and to facilitate cooperation, the international community should promote harmonization of rules pertaining to when parties are permitted to file premerger notification. This can be accomplished by eliminating definitive agreement requirements and postexecution filing deadlines and encouraging all jurisdictions to permit filings at any time after the execution of a letter of intent, contract, agreement in principle, or public bid.
3. For transactions that raise serious competitive issues and require a more in-depth review, the Advisory Committee concludes that merger review should not be an open-ended process and that companies derive value from certainty with respect to merger review periods. The Advisory Committee believes more deadlines should be employed to provide greater certainty and that jurisdictions with lengthy review periods should adopt more expedited time frames for review. The Advisory Committee made a number of suggestions in the U.S. context to address these concerns. One possibility is nonbinding but notional time frames for second-stage review that vary in relation to the relative complexity of the transaction.

### **Notification Forms and Information Requests**

1. To eliminate excessive information requirements, while at the same time ensuring that competition authorities have sufficient information to identify competitively sensitive transactions, the Advisory Committee recommends that initial information requests seek the minimum amount of information necessary to make a preliminary determination of whether a transaction raises competition issues sufficient to warrant further review.
2. Recognizing that there is a trade-off between the amount of information initially provided and the time frame in which clearance is to be granted, mechanisms also should be established to



narrow the legal and factual issues as early as possible. One way to accomplish this goal would be to provide a short form-long form option, leaving it to the notifying parties to choose in the first instance which form to use. The short form would allow the parties to provide less extensive information in transactions that do not raise competitive problems. The long form would require more information concerning the products produced, supplied, or distributed by the parties and the overlapping or vertical markets in which they operate. Alternatively, reviewing authorities may encourage merging parties to voluntarily provide sufficient information to allow the agencies to resolve any potential antitrust issues or engage in a focused inquiry that narrowly targets the antitrust issues.

3. Initial filing requirements in many jurisdictions may be statutorily imposed, and revising these requirements through legislative action may be time consuming. Until reform efforts can be achieved, the Advisory Committee recommends that jurisdictions consider permitting parties to submit an affidavit or letter (in lieu of a notification) explaining why the transaction does not raise competitive concerns.
4. To facilitate quick resolution of potentially problematic transactions deemed worthy of further investigations and focus the issues as soon as possible, there is no substitute for frank information exchange between competition authorities and the parties to a proposed transaction. To that end, each reviewing authority should articulate to the merging parties at the beginning of a second-stage inquiry the competitive concerns that are driving the investigation. This summary could be conveyed orally or in writing. Written summaries should be short and plain statements of the competitive concerns that led the reviewing authority to continue rather than terminate the investigation. Furthermore, this statement should not limit the reviewing authority's discretion to pursue any new theories of competitive harm if new information comes to light.
5. Competition authorities around the world could assess their own performance with respect to those transactions they challenge. One way to do this is an *after-the-fact audit* of merger challenges to examine decisions to prosecute or to refrain from prosecuting specific matters. The audit also could examine the types of information collected during each investigation. The aim of these audits lies in obtaining an objective and frank assessment of performance in previous investigations, thereby laying the groundwork for improvement in future cases. Audits could be conducted internally in more mature merger regimes or by a group of outside observers in newer regimes.
6. There also is much that can be gained from multilateral efforts at soft procedural harmonization of the type undertaken by the OECD. The United States should continue to support OECD efforts to develop a framework for notification, including the development of common definitions. The OECD should continue to focus its efforts on identifying the minimum information necessary as categories of data that may be useful to resolve potentially problematic transactions. As part of this effort, consideration also should be given to ways

to reduce unnecessary burden, including translation costs and overly burdensome certification and other procedural requirements.

<b>Targeted Reform in the United States: Notification Thresholds</b>
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1. The HSR Act already ensures that only transactions with a nexus to the jurisdiction must be notified to the U.S. authorities by providing exemptions from HSR reporting requirements for certain transactions involving non-U.S. companies ("foreign person exemptions"). The foreign person exemptions, however, have not been adjusted for many years. Thus, the Advisory Committee recommends that the FTC review the scope and level of the HSR exemptions for transactions involving foreign persons to ensure that only transactions with an appreciable nexus to the United States must be notified to the U.S. antitrust authorities.
2. The thresholds currently employed by the premerger notification system in the United States deserve careful review. While recognizing that small transactions are not necessarily competitively benign, the Advisory Committee finds that the notification thresholds currently employed in the United States are too low and capture too many lawful transactions. The most straightforward way to decrease the number of required filings, while not materially compromising the agencies' enforcement mission, is to increase the size-of-transaction threshold for acquisitions of both voting securities and assets. Depending on the base year and deflator used, increasing the threshold commensurate with inflation translates into an HSR threshold of \$33 to \$43 million when measured in 1998 dollars. The majority of Advisory Committee members suggest raising the thresholds within this range. Three members suggest raising the threshold even higher, to \$50 million.
3. Indexing the size-of-transaction threshold to account for future inflation has many benefits, but an automatic indexing mechanism also may produce arbitrary results. If an indexing mechanism is not employed, the Advisory Committee recommends that Congress and the U.S. antitrust agencies review notification thresholds periodically (at least every four years) to determine whether they should be increased.
4. The Advisory Committee believes that, ideally, filing fees should be delinked from funding for the agencies. However, given that filing fees currently provide 100 percent of the U.S. agencies' budgets, any effort to delink filing fees or raise thresholds must occur in an environment where sufficient funds are assured from other sources. It is critical to the agencies' enforcement mission that resources are not reduced. This could be accomplished by direct funding from general revenue. If funds are not directly appropriated, this could be accomplished in a variety of ways including increasing the filing fee or creating a sliding scale fee (although the latter alternatives would not accomplish delinking the budget from fees).



### **Targeted Reform in the United States: Review Periods and Timing**

1. A consensus exists among Advisory Committee members on the need for certainty in merger review periods and that merger review should be conducted within reasonable time frames. Advisory Committee members are not of a shared view on the appropriate mechanisms for addressing these concerns, however. Some members of the Advisory Committee believe that fixed maximum review periods are necessary to provide certainty and discipline in the merger review process. Most members of the Advisory Committee feel this would be extremely difficult to achieve under the U.S. system and might result in enforcement errors. There also is concern that maximum time periods would effectively turn into standard or minimum review periods. A majority of Advisory Committee members therefore recommend that alternative steps be taken to provide the greater certainty required for effective transaction planning. For example, the agencies could employ nonbinding but notional time frames for second-stage review that vary in relation to the relative complexity of the transaction. For example, the Canadian Competition Bureau has addressed timing issues with “service standard” guidelines: 14 days for non-complex mergers, 10 weeks for complex mergers, and 5 months for very complex mergers. The 5 month review period employed for very complex mergers coincides with the aggregated five-month review period employed by the EC for mergers that are subjected to second-phase investigations.

### **Targeted Reform in the United States: Notification Forms and Information Requests**

1. The Advisory Committee encourages the FTC to implement changes to better focus the HSR form. In addition, the Advisory Committee recommends that the agencies formalize their current practices that encourage merging parties voluntarily to provide additional information at the initial filing stage in an effort to resolve potential issues without the need for a second request. One way to formalize the process is to create an optional long form, along the lines of the Canadian short form-long form filing. Another way lies in creating a model voluntary submission list that identifies the categories of data that merging parties usefully may submit in facially problematic cases.
2. Another useful practice that should be formalized is that of permitting the merging parties voluntarily to withdraw and refile the acquiring person’s HSR form (without having to pay another filing fee) in order to give the agencies additional time to resolve the matter without having to issue a second request. This practice has been useful when the reviewing agency has been unable to clear a transaction within the initial 30-day review, despite the voluntary provision of additional information. In appropriate cases of this nature, the agencies should alert parties to the option of withdrawing and refiling the HSR notification. Publishing statistics on the number of successful (and unsuccessful) attempts to avoid a second request by withdrawing and refiling a notification would demonstrate the viability of this option and could alleviate concerns that doing so would only add an additional 30 days to the process.



3. When they issue a second request, the agencies should provide the merging parties (either in writing or orally) with their reasons for not clearing the transaction within the initial review period. An explanation of the substantive concerns prompting the issuance of the second request will facilitate transparency in the merger review process and will expedite the process by further enabling the merging parties to focus on and respond to the agencies' concerns. Further, it will assist parties in understanding that the second request is based on genuine substantive concerns. In designing second requests, moreover, the agencies should tailor their requests for additional information to the issues prompting the need for further review.
4. In 1995 the agencies announced that they had addressed concerns about the second-request process by adopting a model second request. The predominant view of ICPAC hearings participants, among others, however, is that this reform helped reduce burdens only marginally. In attempting to identify the appropriate components of a useful and effective model second request, an after-the-fact audit of merger challenges could be undertaken. Such an audit could consider whether the agencies are requesting the right types of information and whether this information subsequently was used at trial (or if discovery tools are sufficient). The answers to these questions might enable the agencies to revise the model second request to reduce compliance burdens on businesses.
5. Merging parties and agency staff frequently are able to negotiate modifications to the scope of second requests. The level of willingness to engage in productive negotiations of this nature appears to vary among agency staff members and counsel for merging parties, and modification requests are sometimes not resolved in a timely fashion. In an attempt to institutionalize a willingness to engage in productive modification negotiations, the Advisory Committee recommends that the agencies impress on agency staff the importance of being open to negotiating modifications to the scope of requests and to do so in a timely fashion. Success in this endeavor also requires a willingness to cooperate on the part of merging parties and their advisors.
6. When modification negotiations break down, parties should be encouraged to use the appeals process, which currently is used hardly at all. Concerns raised to the Advisory Committee about the appeals process include potential stigma from using it, the possible delay engendered by the process, and the perception that the decisionmaker is likely to side with the agency. To this end, the Advisory Committee recommends that the agencies implement measures to make the appeals procedure more attractive to merging parties, including making the appeals process more expeditious, its outcome more transparent, and actively encouraging merging parties to use the process as well as to involve direct supervisory officials in the modification negotiation process, when necessary.
7. The Advisory Committee also considered ways to reduce foreign productions and translation requirements. The agencies should continue their current practice of permitting parties, in appropriate cases, to provide summaries of documents and produce full translations of only those documents the agencies deem particularly relevant to the inquiry. However, the parties

should not as a matter of course be required to forgo a defensible market definition in order to take advantage of this practice. The Advisory Committee recommends that in appropriate cases, the agencies consider whether the selection of the specifications that apply to foreign offices could be limited to those that are directly relevant to the geographic market or that seek documents that pertain to the specific competitive concern at issue.

### **Targeted Reform in the United States: Multiple Review of Mergers**

1. Shared power has the potential to generate inconsistent policy approaches within a single jurisdiction. As a result, it can make global harmonization efforts and cross-border cooperation more difficult. In addition, it imposes heightened uncertainty as to timing and outcome and further increases transaction costs. In its deliberations, the Advisory Committee identified a number of possible policy approaches to address these issues. These proposals ranged from granting exclusive federal jurisdiction to determine competitive consequences of mergers to the DOJ and FTC to clarifying the roles of the DOJ, the FTC, state, and federal sectoral regulators, to imposing timetables and deadlines on the merger review process, to non-legislated convergence strategies.
2. The Advisory Committee believes that the federal antitrust authorities are best positioned to conduct antitrust merger review. The majority of the Advisory Committee would remove competition policy oversight from the sectoral regulators and vest it exclusively with the federal antitrust enforcement agencies. At this juncture, other members advocate the creation of a presumption in favor of the analyses undertaken by the federal antitrust enforcement agencies in parallel or subsequent proceedings.
3. With respect to overlapping state review, the Advisory Committee encourages the state attorneys general to resist using the antitrust laws to pursue noncompetition objectives. Further, the Advisory Committee recommends that the federal antitrust enforcement agencies file an amicus curiae brief in state court in select private suits. For example, appropriate cases may be challenges to transactions the DOJ or FTC has either cleared or settled where there has been significant cross-border cooperation or the parties agreed to waive confidentiality.
4. Other feasible approaches in the short run consist of soft convergence strategies and greater cooperation between agencies exercising concurrent jurisdiction over mergers to encourage the adoption of common analytical methods. Possibilities include creating working groups or representatives of public institutions that review mergers, holding conferences at which representatives of all private and public sector constituencies address policy consistency questions and encouraging reviewing bodies to issue guidelines that delineate their enforcement intentions (or preferably, adopt the DOJ/FTC Horizontal Merger Guidelines).
5. All Advisory Committee members agree that a number of issues relating to overlapping agency review deserve further study. Further studies should include analyzing the relationship

among the DOJ, the FTC, and other federal and state regulators; identifying the differences in review processes with respect to both substantive approaches and procedure; assessing the expertise of the federal antitrust agencies to undertake merger analyses in regulated industries on the one hand, and the capacity of federal sectoral and state regulators to conduct antitrust analyses on the other; assessing the ramifications of a change in the status quo; and gathering the views of the reviewing agencies.



## Chapter 4

# INTERNATIONAL ANTICARTEL ENFORCEMENT AND INTERAGENCY ENFORCEMENT COOPERATION

In the United States, cartel behavior (including price-fixing; volume, customer, and market allocation; and bid-rigging) can be a criminal violation of antitrust laws that may result in high fines for conspiring corporations and key corporate executives, and incarceration for individual defendants.<sup>1</sup> Conspirators may also be liable in private civil suits, in which their conviction in a preceding criminal case may serve as *prima facie* evidence of the alleged civil wrongdoing<sup>2</sup> and prevailing plaintiffs are entitled to treble damages and litigation costs.<sup>3</sup>

During the 1990s the U.S. Department of Justice Antitrust Division aggressively and successfully prosecuted a number of large, complex, and geographically diverse international cartels in a broad spectrum of commerce, including food and feed additives, chemicals, vitamins, graphite electrodes (used in manufacturing steel), and marine construction and transportation services.<sup>4</sup> Antitrust Division calculations of the volume of commerce affected by such cartels point to their costly consequences for the U.S. market. At the same time, it is clear that their adverse impact is global and has affected markets and consumers in other countries as well.<sup>5</sup>

Evidence suggests that recent U.S. prosecutorial successes are catching the attention of multinational businesses,<sup>6</sup> and that cartel conspirators are consequently arranging to meet outside

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<sup>1</sup> Section 1 of the Sherman Act, 15 U.S.C. §1.

<sup>2</sup> Section 4(a) of the Clayton Act, 15 U.S.C. §15.

<sup>3</sup> Section 5(a) of The Clayton Act, 15 U.S.C. §16.

<sup>4</sup> One member of the private bar predicts that “the most significant and enduring antitrust enforcement initiative of this era will be the aggressive criminal enforcement of international cartels by the Antitrust Division. Donald C. Klawiter, *Criminal Antitrust Comes to the Global Market*, 13 ST. JOHN’S J. LEGAL COMMENT. 201 [hereinafter Klawiter, *Criminal Antitrust*]. A list of the Antitrust Division’s international cartel prosecutions appears in Annex 4-A hereto.

<sup>5</sup> For instance, the size of the markets affected by some of the recent international cartels under U.S. investigation is described as “involv[ing] hundreds of millions, or even billions, of U.S. dollars in annual sales worldwide.” Joel I. Klein, Assistant Attorney General for Antitrust, U.S. Department of Justice, *Anticipating the Millennium: International Antitrust Enforcement at the End of the Twentieth Century*, presented at Fordham Corporate Law Institute 24<sup>th</sup> Annual Conference on International Law and Policy 3 (Oct. 16, 1997).

<sup>6</sup> A. Paul Victor, *The Growth of International Criminal Enforcement*, 6 GEO. MASON L. REV. 493, 501; Klawiter, *Criminal Antitrust* at 221. (Cautioning corporations doing business globally, particularly foreign corporations and their

of the United States.<sup>7</sup> But it is also clear that knowledge of the risks involved alone may not be sufficient to deter a company from engaging in cartel behavior that it perceives as advantageous. U.S. authorities have already successfully prosecuted one company for its participation in two different cartel arrangements.<sup>8</sup>

Further, U.S. cases against international cartels participants have sparked considerable interest among antitrust enforcement agencies in other countries, despite earlier experiences in which U.S. anticartel enforcement efforts against foreign conspirators was a sometime source of friction with many of these same jurisdictions. Antitrust investigations today are taking place in an environment of greater international enforcement cooperation, and the recent U.S. enforcement successes appear to be occurring amidst a heightened degree of international consensus among enforcers that cartels should be detected and prosecuted. Indeed, some competition authorities are enforcing their domestic laws against many of the same cartels that the United States has successfully prosecuted.

At the same time, the number and magnitude of the international cartels prosecuted by the United States gives rise to several questions. For example, it is not clear whether the surge in U.S. prosecutions indicates that more cartels are operating than ever before or simply that U.S. abilities at detecting them have improved. Nor is it clear how much harm international cartels may be inflicting on economies throughout the world. The Advisory Committee considered these and other questions, discussed in detail below, in its deliberations. Many of these cannot yet be resolved definitively. Nonetheless, it seems likely that greater cooperation and coordination among antitrust enforcement authorities are key to answering these questions.

To better understand these issues, this chapter first reviews the record of U.S. enforcement actions against international cartels. Second, it considers a number of key questions regarding this enforcement record, such as possible explanations for the recent successes, the importance of international assistance, and trends in anticartel enforcement by enforcement authorities around the world. The chapter then discusses issues arising over the use and management of confidential

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key executives, about the need to be educated in U.S. antitrust law and made aware of their heightened exposure to U.S. antitrust enforcement actions.)

<sup>7</sup> Gary R. Spratling, then-Deputy Assistant Attorney General for Antitrust, U.S. Department of Justice, *International Cartels: The Intersection Between FCPA Violations and Antitrust Violations*, presented before the American Conf. Institute 7<sup>th</sup> Natl. Conf. on Foreign Corrupt Practices Act (Dec. 9, 1999) 10 [hereinafter, Spratling, FCPA].

<sup>8</sup> In the *Vitamins* matter, F. Hoffmann-La Roche Ltd. agreed to plead guilty and pay a fine of \$500 million in 1999. Two years earlier, in 1997, when it pled guilty and paid a fine of \$14 million for its involvement in the *Citric Acid* cartel the corporation decided, nonetheless, to continue its role in the *Vitamins* conspiracy. David Barboza, *Tearing Down The Facade of 'Vitamins Inc.'*, N.Y. TIMES, October 10, 1999 at Sec. 3 at 1 [hereinafter Barboza, *Vitamins Inc.*] (describing how F. Hoffmann-La Roche, "had gone this route before. Roche's antitrust problems date to the early 1970's, when it was fined by antitrust officials in Europe for engaging in anticompetitive behavior in the sale of two [drugs] ... Roche also faced [European antitrust] litigation over the vitamin market in 1973."). *Id.* at Sec. 3 at 11.



business information in anticartel and other antitrust enforcement efforts. And finally, the chapter concludes by considering positive incentives that U.S. antitrust authorities may use to encourage other competition authorities to make the prosecution of international cartels a priority and to expand their cooperation with the United States.

### THE U.S. ENFORCEMENT RECORD

History has shown that cartels with effects in the United States are not just a matter of domestic activity. While the number and importance of successful international cartel prosecutions brought by the Antitrust Division have increased significantly since the early 1990s, these matters follow on a long history of prosecuting international cartels. The first major case with an international dimension was *U.S. v. American Tobacco*, brought in 1907. In that case, the Department of Justice filed charges against 94 U.S. firms and individuals and two British firms, challenging the creation of a private tobacco monopoly in the United States. One part of the illegal conduct was an agreement between the British tobacco firms and the U.S. firms to stay out of one another's home markets and divide up the rest of the world. Those adversely affected included U.S., British, and other consumers. The British firms argued that their conduct was not covered by the Sherman Act but the U.S. Supreme Court disagreed, holding that the conduct of defendants, American and British alike, was illegal.<sup>9</sup>

Some scholars have estimated that international cartels controlled as much as 40 percent of world trade between 1929 and 1937, and that the majority of their members were from Europe and, to a lesser extent, North America.<sup>10</sup> From the 1940s through the beginning of the 1950s, the U.S. antitrust agencies began to file significant numbers of international antitrust cases -- some criminal, some civil -- against a wide range of international cartels that affected transborder trade. The terms of the challenged cartel agreements varied from case to case, although many were along the lines of the facts in *American Tobacco*: U.S. firms agreeing not to sell in Europe; European firms agreeing

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<sup>9</sup> *United States v. American Tobacco Co.*, 221 U.S. 106, 184 (1911).

<sup>10</sup> Helga Nussbaum, *International Cartels and Multinational Enterprises* in *MULTINATIONAL ENTERPRISES IN HISTORICAL PERSPECTIVE*, (Alice Teichova et al. eds. 1986) 131, 134. There are a variety of other estimates of the number of cartels in the years leading up to WWII that are within the range identified by Professor Nussbaum. For example, a German scholar provided estimated that about 112 international cartels were in existence in 1912, GEORGE W. STOCKING AND MYRON R. WATKINS, *CARTELS OR COMPETITION?* (1948) 31, *cited in* KURT R. MIROW & HARRY MAURER, *WEBS OF POWER: INTERNATIONAL CARTELS AND WORLD ECONOMY* (1982) 22 and n. 23 [hereinafter MIROW AND MAURER, *WEBS OF POWER*]. Another estimate is that some 114 international cartels were in existence prior to World War I and their participants were, for the most part, continental European in scope and origin and largely territorial extensions of or annexes to national cartels. WILLIAM F. NOTZ, *REPRESENTATIVE INTERNATIONAL CARTELS, COMBINES AND TRUSTS*, (U.S. Department of Commerce, Bureau of Foreign and Domestic Commerce, Trade Promotion Series No. 81, 1929) 4. A study done for the Department of Justice in 1944 found that a total of 179 international cartels were in existence at the outset of World War II, and that U.S. firms participated in 109 of these. Corwin D. Edwards, "International Cartels as Obstacles to International Trade" (AER Supp., March 1944), *cited in* James Rahl, *International Cartels and their Regulation* in *COMPETITION IN INTERNATIONAL BUSINESS* (Oscar Schacter and Robert Hellawell eds. 1981) 240, 244 and n. 13.



not to sell in the United States; and other collusive arrangements made to limit competition in third-country markets. Indeed, during that period, the Department of Justice filed charges against a wide range of international cartels involving U.S. and European firms and a diversity of products, including: aluminum, dyes, incandescent lamps, nylon, titanium, tungsten carbide, roller bearings, military optical equipment, and aircraft instruments, among other things.<sup>11</sup> The relief obtained against these cartels varied from prohibiting further implementation of the cartels in U.S. markets to imposition of significant criminal fines sometimes on individuals as well as firms.

From the early 1950s through the early 1990s, U.S. antitrust agencies filed relatively fewer international cases than in previous decades, while enforcement efforts were more actively engaged in bringing domestic price-fixing and bid-rigging cases. Some of the international actions filed, for example, involved products such as quinine, uranium, potash, ball bearings, and wire rod.<sup>12</sup>

### **Surge in U.S. International Cartel Prosecutions**

Since 1993, the Antitrust Division has made international antitrust enforcement and cooperation a priority,<sup>13</sup> and since 1995 has given top priority to aggressive enforcement against

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<sup>11</sup> For a lengthier treatment, *see generally*, WILBUR L. FUGATE, 1 FOREIGN COMMERCE AND THE ANTITRUST LAWS §2.21 (5th ed. 1996); BARRY HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE 1-28 (2d ed. 1996); SPENCER WEBER WALLER, 1 ANTITRUST AND AMERICAN BUSINESS ABROAD §§2:13-2:16 (3d ed. 1997).

<sup>12</sup> The *Quinine* cases in the mid-1970s provide one illustration of the scope of these cases, U.S. v. Nederlandsche Combinatie Voor Chemische Industrie, 68 Cr. No. 8770 (S.D.N.Y. 1968) (indictment filed), 70 Civ. No. 2080 (S.D.N.Y. 1970) (complaints filed), 1970-1979 TRANS. BIND.- U.S. ANTITRUST CASE SUMMARIES TRADE REG. REP. (CCH) ¶45,070, Cases 2023, 2102, 2103 (involving both an arrangement among the European producers that only one conspirator would bid on the purchase of part of the U.S. government quinine stockpile but would share the purchase with the producers who refrained from bidding, and an alleged market division and a price-fixing agreement applying to the United States, among other things). Also, the much-discussed *Uranium* cartel cases, *In re Westinghouse Elec. Corp. Uranium Contracts*, 405 F. Supp. 316 (J.P.M.L. 1975). Some other examples include the *Singer* cases, which involved a conspiracy through patent pooling between U.S. and Swiss sewing machine producers to eliminate competing Japanese imports into the United States. *United States v. Singer Mfg. Co.*, 374 U.S. 174 (1963); the *Canadian Radio Patents* case, in which U.S. and Dutch firms were charged with restraining U.S. exports of radios and televisions to Canada, through the anticompetitive use of patent pools *United States v. General Electric Co.*, 1962 Trade Cas. (CCH) (S.D.N.Y. 1962); and the *Addison-Wesley Publishing* case, a civil action in which U.S. and British book publishers allocated world markets among themselves, *United States v. Addison Wesley Publ. Co.*, 1976-2 Trade Cas. (CCH) 61,225 (S.D.N.Y. 1976).

<sup>13</sup> Anne K. Bingaman, then-Assistant Attorney General for Antitrust, U.S. Department of Justice, Change and Continuity in Antitrust Enforcement, presented to the Fordham Corporate Law Institute, Fordham Law School (Oct. 21, 1993) 1-5 [hereinafter Bingaman, Change and Continuity] (explaining that prioritizing international issues responds to the impact made by an increasingly global economy on the U.S. economy and is in keeping with priorities of the prior administration and then-Assistant Attorney General for Antitrust, James F. Rill).

international cartels.<sup>14</sup> In the process the Antitrust Division has built a record of successful prosecutions of nearly 20 international cartels, charging more than 80 corporate and 60 individual defendants in the process.<sup>15</sup>

Statistically, approximately twenty-five percent of the more than 625 criminal antitrust cases filed by the Department of Justice since fiscal year 1990 were international in scope. This marks a departure from trends in immediately preceding years, when prosecutions of international cartel were not much more than a footnote in Antitrust Division enforcement statistics, at least in terms of numbers if not importance.<sup>16</sup>

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<sup>14</sup> Anne K. Bingaman, then-Assistant Attorney General for Antitrust, U.S. Department of Justice, The Clinton Administration: Trends In Criminal Antitrust Enforcement, address before the Corporate Counsel Institute (Nov. 30, 1995). Vigorous enforcement against international cartels continues to be a top priority because international cartels typically pose a greater threat to U.S. businesses and consumers than do domestic cartels since they tend to be highly sophisticated and extremely broad in their geographic reach and economic impact. Prepared statement of Joel I Klein, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Before the Senate Judiciary Committee, Antitrust, Business Rights and Competition Subcommittee (May 4, 1999) at 8 [hereinafter Klein 1999 Senate Testimony].

<sup>15</sup> See Annex 4-A. Dates are expressed in fiscal years, which run from October 1 through September 30. As noted in Chapter 1, the Antitrust Division has not historically maintained separate data for “international” and “domestic” matters and there is no single set of methodologically compiled statistics on how many “international” cartel matters are or have been filed. Until very recently, there was no single articulation of how to define an “international” matter for such purposes. To calculate the international cartel statistics in this and the next paragraph, ICPAC used the definition for “international matters” developed in FY 1997 by the Antitrust Division for data collection associated with its performance measurement efforts:

An international matter -- that is, investigation or case -- is so defined if it involves possible anticompetitive impact on U.S. domestic or foreign commerce, and if any one of the following criteria is met, leading to increased complexity and greater resource requirements than would otherwise be the case: one or more involved parties\* is not a U.S. citizen or a U.S. business; one or more involved parties\* is not located in the U.S.; potentially relevant information is located outside the U.S.; conduct potentially illegal under U.S. law occurred outside the U.S.; or substantive foreign government consultation or coordination is undertaken in connection with the matter. [\* ... where “involved party” may be an individual or corporation that is the subject or target, or potential subject or potential target, of a criminal or civil non-merger investigation or case; a party to a merger or an acquisition; or otherwise a participant or potential participant in an investigation or case].  
(Emphasis omitted). U.S. Department of Justice, Antitrust Division, Executive Office (December 1999).

<sup>16</sup> From 1987 through 1990, the Antitrust Division did not file a single criminal cartel case against a foreign-based corporation or individual. In 1991, only 1 percent of corporate defendants and no individual defendants in the Antitrust Division’s cartel prosecution were foreign-based. By 1997, the figures had surged so that 32 percent of corporate defendants and the same number of individual defendants were foreign-based. Prepared statement of Joel I Klein, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Before the Senate Judiciary Committee, Antitrust, Business Rights and Competition Subcommittee (Oct. 2, 1998) at 8 -9 [hereinafter Klein 1998 Senate Testimony]. The figures continued to escalate so that in 1998 and again in 1999, nearly 50% of corporate defendants in criminal cartel cases were foreign-based. Spratling, FCPA, at 2.



U.S. investigations into international cartels today are uncovering a geographically diverse group of participants, located on at least 5 continents and more than 20 different countries. Moreover, participants have conducted cartel business in at least 100 cities in 35 countries, including most of the Far East and nearly every country in Western Europe.<sup>17</sup>

The upswing in prosecutions is traced in part to the decision in 1995 by the Antitrust Division to reallocate its resources to concentrate on large or complex international cartels. In the ensuing years, the Antitrust Division has filed an unprecedented number of grand jury investigations and criminal prosecutions against foreign corporate and individual defendants engaged in private international cartel activities.<sup>18</sup> Antitrust officials reported that since 1997 between 25 and 35 grand juries have been active at any given time, all looking into suspected international cartel activities. This represents about one-third of the Division's criminal investigations during the time period, according to U.S. antitrust officials.<sup>19</sup>

The underlying volume of commerce affected by international cartels is also very significant. The Antitrust Division has estimated that this figure is more than \$1 billion a year in the U.S. alone in some investigations and, in others, more than \$500 million a year. In more than half the criminal investigations, the volume of affected commerce has exceeded \$100 million over the term of the conspiracy.<sup>20</sup> Anecdotally, U.S. antitrust authorities report that those cartels prosecuted over the past several years represent just the tip of the iceberg.<sup>21</sup>

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<sup>17</sup> Joel I. Klein, Assistant Attorney General, U.S. Department of Justice, *The War Against International Cartels: Lessons From the Battlefield*, Address before the Fordham Corporate Law Institute 26th Annual Conference on International Antitrust Law and Policy (Oct. 14, 1999) 8-9 [hereinafter, Klein, *Lessons From the Battlefield*], Appendix "Locations of International Cartel Meetings Affecting United States Commerce (rev'd. June 1999)." The data here includes only information from cases that the Department of Justice has already filed or where prosecution is imminent. Antitrust Division officials indicate that there are other cities that are not listed because information on meetings held there derives from other ongoing nonpublic investigations. Testimony of Gary R. Spratling, then-Deputy Assistant Attorney General for Antitrust, U.S. Department of Justice, ICPAC Meeting, Feb. 26, 1998 at 54.

<sup>18</sup> The increased number of foreign targets and defendants in U.S. cartel matters reflects the fact that international cartels will likely consist of one U.S. firm and several firms from other jurisdictions, rather than any U.S. government policy to target foreign firms. See Spratling, FCPA at 4.

<sup>19</sup> These statistics are updated regularly in speeches and testimony by Division officials, see e.g., Klein, *Lessons From the Battlefield*, Appendix "Status Report: International Cartel Enforcement."

<sup>20</sup> Klein 1999 Senate Testimony, at 8; Gary R. Spratling, then-Deputy Assistant Attorney General for Antitrust, U.S. Department of Justice, *Are the Recent Titanic Fines in Antitrust Cases Just the Tip of the Iceberg?*, presented at the American Bar Assoc. Criminal Justice Sec. 12<sup>th</sup> Annual Natl. Inst. on White Collar Crime (Mar. 6, 1998) 3 [hereinafter, Spratling, *Titanic*].

<sup>21</sup> Most recently, Assistant Attorney General Joel Klein stated, "After *Graphite Electrodes*, *Vitamins*, and a few other recent cases, we can say that we've now seen quite a bit more of the iceberg. But there's still an awful lot of illegal activity below the waterline. We have, for example, uncovered an international cartel operating in a manufacturing industry affecting over \$1 billion in U.S. commerce; it would appear that the conspirators agreed to raise prices by over



Perhaps the best-known and most distinctive feature of the Antitrust Division's recent anticartel program has been an exponential increase in the level of fines imposed in cartel cases, as depicted in Annex 4-A hereto. Since fiscal year 1997, international cartel prosecutions have accounted for more than 90 percent of the fines imposed in criminal antitrust cases annually. To illustrate the significance of this statistic, consider that in the decade between fiscal year 1987 and fiscal year 1996, the total amount of fines imposed in anticartel cases equaled slightly more than \$295 million, whereas the sum of fines imposed during the subsequent two fiscal years was roughly \$472 million, and the total amount of fines imposed in fiscal year 1999 exceeded \$1.1 billion. In fiscal year 1999 alone, fines imposed in criminal cases exceeded \$1.1 billion -- more than the sum of all fines previously secured in over a century of Sherman Act enforcement.<sup>22</sup>

One key factor in the level of criminal penalties being imposed today was an act of Congress in 1990, urged by then-Assistant Attorney General James F. Rill, to increase the maximum fine for price-fixing and other cartel activities ten-fold, from \$1 to \$10 million for corporations, and from \$100,000 to \$350,000 for individual defendants.<sup>23</sup> A second important factor was the 1991 amendment of the Federal Sentencing Guidelines permitting fines to be calculated in excess of the \$10 million cap for violations of Section One of the Sherman Act, depending on the volume of commerce affected, and establishing the "alternative sentencing guideline" under which maximum fines for antitrust criminal defendants can be calculated at twice the gross pecuniary gain derived from the crime or twice the gross pecuniary loss caused to the victims of the crime.<sup>24</sup> At the time

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60% to customers in the U.S. and abroad during the term of the conspiracy. The Division also is investigating an alleged international cartel operating in a metals industry; the suspected conspiracy apparently affected roughly \$750 million of U.S. commerce, and prices are believed to have increased by over 20% as a result of the alleged cartel agreement. I can't say any more about these matters at this time because they are under investigation. But suffice it to say, there is more to come." Klein, *Lessons From the Battlefield*, at 8.

<sup>22</sup> Joel I. Klein, Assistant Attorney General for Antitrust, U.S. Department of Justice, Luncheon Address before the International Anti-Cartel Enforcement Conference 3 (Sept. 30, 1999).

<sup>23</sup> 15 U.S.C. § 1. Individual defendants may also receive a maximum three year prison term, either alone or in addition to a fine. Moreover, criminal antitrust acts were elevated to felonies from misdemeanors in 1975. *Id.* Under the U.S. Sentencing Guidelines, fines for criminal antitrust defendants may be increased to twice the gain derived from the crime or twice the loss suffered by the victims of the crime, if either of those amounts is greater than the statutory maximum fine. 18 U.S.C. § 3571(d).

<sup>24</sup> *Id.* The Sentencing Guidelines provide for a base fine for corporate antitrust offenders, foreign or domestic, of 20 percent of the volume of commerce affected by the conspiracy, but not less than 15 percent in antitrust cases. Reductions in the base fine are possible if certain mitigating factors are present, although only if the court determines to use a reduced base fine level in its calculations. When calculating a defendant's Sentencing Guidelines fine range, a court will normally use the volume of U.S. commerce affected by the defendant's participation in a conspiracy. However, a court may consider the defendant's worldwide (U.S. and foreign) sales in the calculation when the amount of U.S. commerce affected by a defendant in an international cartel understates the seriousness of the defendant's role in the offense and, therefore, the impact of the defendant's conduct on American businesses and consumers. United States Sentencing Guidelines Manual §§ 2R1.1, 8C2.1 *et seq.* (1998).

of these changes, a fine of \$10 million had never been imposed. Indeed, as recently as fiscal year 1992, the highest corporate fine for a criminal price-fixing violation was \$2 million.

In 1996, Archer Daniels Midland (ADM), a U.S. firm, agreed to pay \$100 million for the impact that its role had on the U.S. market in both the *Lysine* (\$70 million fine) and *Citric Acid* (\$30 million fine) cartels.<sup>25</sup> Since then, fines of \$10 million or more have become commonplace in international cartel cases, as the chart in Annex 4-A hereto shows,<sup>26</sup> and has even lead one Antitrust Division official to dub the growing numbers of corporations paying fines at these levels members of "the \$10,000,000 Club."<sup>27</sup> Twenty-one of the 26 firms fined \$10 million or more are foreign companies or U.S. subsidiaries of foreign-based parents. These experiences have led the Antitrust Division to urge Congress once again to increase the maximum statutory fine ten-fold, to \$100 million.<sup>28</sup>

Prison terms and fines for individual defendants in cartel cases since 1990 have also set new precedents. In the 1995 *Disposable Plastic Dinnerware* case, seven individual defendants pleaded guilty and received jail sentences from 4 to 21 months; among the seven were two Canadians, the first foreign executives ever to agree to serve time in U.S. prisons for violations of the Sherman Act. After a jury trial, three former officials of ADM were sentenced to jail periods ranging from 24 to 36 months and to pay fines of up to \$350,000 for their roles in the conspiracies. Two former executives from the U.S. firm involved in the *Graphite Electrodes* cartel agreed to serve jail terms of 9 and 17 months and to pay fines of \$1 million and \$1.25 million, respectively, while a German executive of the German firm entered into a plea agreement under which he was fined \$10 million for a two-count violation of the Sherman Act -- the largest fine against any individual in the history

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<sup>25</sup> See U.S. Department of Justice Press Release 96-0508, "Archer Daniels Midland Co. to Plead Guilty and Pay \$100 Million for Role in Two International Price-Fixing Conspiracies" (Oct. 15, 1996). ADM paid a \$70 million fine for its part in the *Lysine* cartel and a fine of \$30 million for participating in the *Citric Acid* cartel.

<sup>26</sup> Because of the magnitude of the volume of commerce affected by these cartels, fines in most of these cases are calculated pursuant to the "alternative sentencing guidelines" of the Federal Sentencing Guidelines rather than by applying maximum allowable fines established in the Sherman Act. One member of the private antitrust bar observed that this alternative enables the United States to "make the punishment fit the crime" in prosecutions involving substantial volumes of commerce, "a feat that could not be accomplished by imposing only the Sherman Act's maximum fine of \$10 million." Klawiter, *Criminal Antitrust* at 205. The Antitrust Division frequently publicizes details about how these calculations are reached, using examples from a number of actual cartel prosecutions. See e.g., Gary R. Spratling, then-Deputy Assistant Attorney General for Antitrust, U.S. Department of Justice, Transparency in Enforcement Maximizes Cooperation From Antitrust Offenders, Address before the Fordham Corporate Law Institute 26th Annual Conference on International Antitrust Law and Policy, Appendix 22 (Oct. 15, 1999) (Fine Calculation - Summary Sheets for defendants in several recent international cartel cases) [hereinafter, Spratling, Transparency].

<sup>27</sup> Gary R. Spratling, The Trend Towards Higher Corporate Fines: It's a Whole New Ball Game, presented at the American Bar Assoc. Criminal Justice Sec. 11<sup>th</sup> Annual Natl. Inst. on White Collar Crime (Mar. 7, 1997) 1 [hereinafter Spratling, Ball Game].

<sup>28</sup> See, Klein 1998 Senate Testimony.



of U.S. criminal antitrust enforcement. Furthermore, all of the individual defendants charged in the ongoing investigation into the *Vitamins* cartel, including two Swiss citizens, will serve or are facing potential prison terms as well as significant fines. This marks the first time that European nationals will voluntarily serve time in U.S. prisons for violating U.S. antitrust laws.

### **Examples of Recent International Cartels**

A hallmark of international cartel activity is the degree of sophistication with which these conspiracies operate and the recent cartels are no exception. That sophistication is reflected in the level of detail at which cartel agreements are forged, the mechanisms participants employ to monitor and police adherence to agreements, and the ability of participants to travel in and out of diverse jurisdictions for meetings while largely avoiding gathering in jurisdictions such as the United States, where the risk of being detected and prosecuted is deemed too high.<sup>29</sup> An examination of the workings of several recently prosecuted international cartels demonstrates the scope and complexity of the cartel arrangements as well as their geographical diversity.<sup>30</sup>

#### *Citric Acid and Lysine Cartels (Food and Feed Additives Cartels)*

In August 1996, the Antitrust Division began its prosecution of two related cartels in the food and feed additives industries. In the *Citric Acid* cartel, five firms -- a U.S. firm (ADM); a German-based firm; two Swiss firms; and a French-based, Dutch firm -- as well as several foreign nationals all pleaded guilty to fixing prices and allocating sales volumes in the United States and elsewhere for citric acid, an organic food additive used in beverages, cosmetics, medicine, detergents, chemicals, and textiles, from July 1991 to June 1995. Annual sales of citric acid exceeded \$1.2 billion worldwide when the prosecutions were filed, and list prices were raised to U.S. customers by more than 30%, resulting in hundreds of millions of dollars in added revenue for the conspirators.

In the *Lysine* cartel, five firms and six individuals conspired from June 1992 to June 1995, to fix prices and allocate sales of lysine, a livestock feed additive. Corporate participants included ADM, two Japanese firms, a Korean-based firm with U.S. operations, and a separate Korean firm. During the first months alone of this conspiracy, prices went up about 70% in a market with roughly \$600 million in annual sales worldwide.

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<sup>29</sup> U.S. antitrust authorities report that members of international cartels have stated that they avoid meeting in the United States for two key reasons: because the United States is very aggressive in investigating and prosecuting cartel activity and the sanctions are severe; and because foreign antitrust authorities may lack the resources to detect and investigate cartel activity and, even assuming the conduct is discovered, the potential sanctions abroad are not serious as compared to the potential gain. U.S. Department of Justice, Antitrust Division Office of Criminal Enforcement.

<sup>30</sup> Details on these and other U.S. international cartel prosecutions are available on the Antitrust Division's website, at <http://www.usdoj.gov/atr/>.



Operations in the *Citric Acid* cartel included secret meetings by high-level executives from the conspiring firms at locations throughout the world, where they agreed on the broad terms of the conspiracy and left lower-ranking executives to work out the details and implementation of the agreement. The cartel members developed a sophisticated enforcement system to police their agreement that involved setting the prices they would charge for citric acid and the percentage -- to a tenth of a decimal point -- of the total market share that each participant was allowed to sell worldwide; sharing monthly figures for worldwide sales with their co-conspirators so that they could see whether each company was staying within its allotted sales volume percentage; and reviewing the sales of each conspirator at the end of the year. Any company that sold more than its allotted share was required in the following year to purchase the excess from another conspirator that had not reached its volume allocation target.

In the *Lysine* cartel, similarly clandestine meetings took place. Participants established a legitimate-looking "cover" industry organization to disguise their meetings to fix prices and set up a system of sales volume allocations. That system required participants to file reports with a central auditor to implement the allocation agreement and ensure enforcement of the price-fixing agreement and the sales and volume agreements. The scheme also featured a compensation arrangement in case a firm exceeded its quota.

The *Citric Acid* and *Lysine* cases raised the visibility of several important aspects of the recent U.S. anticartel enforcement program. They marked the first time a defendant was fined above the statutory \$10 million maximum based on calculations under the Federal Sentencing Guidelines for a single-count violation of the Sherman Act. Additionally, the prosecutions were characterized by unusually detailed evidence, including video and audio taping of meetings and conversations. This evidence resulted from close cooperation between the Antitrust Division and the FBI, much of which was obtained through a government informant. These materials were introduced at trial to convict three former officials of ADM. A fourth indicted individual defendant, a Japanese national, remains a fugitive. One of the important results of this trial is that it enables other antitrust authorities to access materials made public through the trial process and use them in determining the impact of these cartels in their own jurisdictions.

#### *Graphite Electrodes Cartel*

Graphite electrodes, large columns used in the electric arc furnace "mini-mill" method of steelmaking, are essential to 50 percent of steel manufactured in the U.S. The electrodes generate the intense heat necessary to melt scrap and further refine steel, and are consumed in the process. Six firms -- one U.S., one German, and four Japanese or Japanese-based -- along with a German national and two U.S. individuals, have pleaded guilty to date to conspiring to fix and raise the price of graphite electrodes in the United States and abroad, resulting in higher prices to steel makers. The conspiracy lasted from approximately 1992 to 1997 and during this period total U.S. sales were approximately \$1.7 billion. Indictments have also been issued against a fifth Japanese firm and a third U.S. executive.

The cartel involved a complex set of interactions through which participants attended meetings in the Far East, Europe, and the United States in which the prices and volume of sales of graphite electrodes in the United States and elsewhere were discussed. As described in the plea agreements entered by defendants, cartel participants agreed to increase and maintain prices; eliminate discounts; allocate among themselves the volumes of graphite electrodes to be sold; and divide the world market among themselves, designating on a region-by-region basis, including the United States, who would act as lead in fixing prices for the others to follow. They also exchanged sales and customer information in order to monitor and ensure compliance with the agreements. To safeguard the cartel, the participants restricted access of manufacturing technology to their members and, to evade detection, even used code names in their communications.

The ability of the government to advance its investigation and prosecute members of the *Graphite Electrodes* cartel hinged on cooperation from a U.S. conspirator obtained through a grant of amnesty under the Antitrust Division's Corporate Leniency Policy. Cooperation from the amnesty applicant led to the simultaneous execution of search warrants in the United States and the EU.

The pervasiveness of this cartel and the success of U.S. prosecutors has prompted interest from antitrust authorities abroad in considering the matter. Canada has an investigation underway that already generated one prosecution by the end of 1999 for violations of the Canadian Competition Act.<sup>31</sup> Additionally, the Japan Fair Trade Commission (JFTC) investigated six companies -- four Japanese, one U.S., and one German -- for conspiring to cartelize the Japanese graphite electrodes markets in violation of the Japanese Anti-Monopoly Act. Ultimately, however, the JFTC did not make a formal finding of a violation but instead issued a warning to the Japanese companies to cease the activities in question.<sup>32</sup> Moreover, the European Union has indicated that it is investigating the graphite electrodes cartel and its impact in Member State markets.

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<sup>31</sup> The U.S. firm UCAR Inc. pleaded guilty to participating in price-fixing in the graphite electrodes market and agreed to pay a record Canadian fine of CDN\$11 million and restitution in excess of CDN\$19 million. The Competition Bureau's investigation into the graphite electrodes industry continues. Competition Bureau News Release, "Record \$30 Million Fine and Restitution by UCAR Inc. for Price Fixing Affecting the Steel Industry" (Mar. 18, 1999), at <[HTTP://STRATEGIS.IC.GC.CA/SSG/CT01478E.HTML](http://strategis.ic.gc.ca/ssg/ct01478e.html)>. See Annex 4-C for a complete list of Canadian Competition Bureau international cartel prosecutions.

<sup>32</sup> See JFTC "Press Release Concerning Warning Involving Graphite Electrodes Producers" [unofficial translation of title] (Mar. 18, 1999), at <[HTTP://WWW.JFTC.ADMIX/GO.JP/PRESSRELEASE/99.MARCH/990318.HTML](http://www.jftc.admix.go.jp/pressrelease/99.march/990318.html)>. Warnings of this sort are provided informally by the JFTC when, after an investigation, it does not find sufficient evidence to take formal enforcement measures but believes the activities under review threaten to violate the Anti-Monopoly Act. As in this instance, a warning is usually accompanied by administrative guidance that the practice in question be discontinued.



### *Vitamins Cartel*

This long-lived conspiracy -- self-labeled "Vitamins, Inc."<sup>33</sup> -- carved up the worldwide markets for its products, recruiting big manufacturers to join the coalition, and involved a succession of meetings of high level executives to set world prices of different vitamins, exchange sales and market share data, and enforce their agreements. All seven corporate defendants -- two Swiss, one Canadian and one German, and three Japanese -- have pleaded guilty. The Antitrust Division also has thus far also prosecuted seven U.S. and foreign executives who participated in the cartel. Each of these individuals, including the foreign defendants, has also pleaded guilty and is either already serving time in federal prison, awaiting sentencing, or facing potential jail sentences as well as heavy fines.

This cartel lasted almost a decade, from 1990 until 1999, and involved a highly sophisticated and elaborate conspiracy to control everything about the worldwide sales of vitamins A, B<sub>2</sub>, B<sub>4</sub> (choline chloride), B<sub>5</sub>, C, E, beta carotene, and vitamin premixes. The premixes are used by food and beverage makers, pharmaceutical and cosmetics companies, and animal feed operations. Executives from cartel members held annual meetings to allocate market share, supply contracts, and sales volume among themselves, as well as to fix and raise the prices of vitamins around the world. Additionally, they agreed to divide contracts to supply vitamin premixes to customers in the United States by rigging the bids for those contracts. Cartel participants held frequent interim meetings to monitor and enforce the agreed-upon prices and market shares.

The *Vitamins* conspiracy is significant on a number of fronts. It is the largest cartel -- international or domestic -- uncovered or prosecuted by antitrust authorities in the United States or elsewhere and resulted in a fine of \$500 million from one of the cartel's leaders, F. Hoffmann-La Roche, a Swiss firm. Other significant penalties imposed to date include commitments from two, Swiss nationals, former top executives of F. Hoffmann-La Roche, to serve jail sentences in U.S. prisons, and a fine of \$225 million imposed on BASF, a German co-conspirator. The fine imposed on F. Hoffmann-La Roche is the largest in the history of *all* U.S. criminal enforcement; and the commitments from its two European former top executives to serve U.S. jail terms is also unprecedented.

The Antitrust Division's ability to crack the conspiracy turned on cooperation from a conspirator, a French firm, which qualified for amnesty under the Corporate Leniency Policy. In addition, once firms such as F. Hoffmann-La Roche and BASF decided to step forward and accept responsibility for their actions, their cooperation was "nothing less than exemplary."<sup>34</sup> This cartel prosecution has caught the attention of antitrust authorities in several other important jurisdictions. Canada has already prosecuted several corporate and individual participants in the *Vitamins* cartel,

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<sup>33</sup> Barboza, *Vitamins Inc.*, at Sec. 3 at 1.

<sup>34</sup> U.S. Department of Justice Press Release 99-196, "F. Hoffmann-La Roche and BASF agree to Pay Record Criminal Fines for Participating in International Vitamin Cartel" (May 20, 1999) at 2.



while antitrust authorities in Europe, Japan, and Australia all indicate interest in investigating the impact of the cartel in their respective jurisdictions. U.S. officials also state that the *Vitamins* cartel prosecution has galvanized a consumer movement around the world that has added a degree of public pressure on governments to detect and eliminate cartels affecting local prices.<sup>35</sup>

### KEY ISSUES BEFORE THE ADVISORY COMMITTEE

The Advisory Committee has considered several important questions regarding recent developments. For example, what accounts for the surge in recent U.S. investigation and prosecutions of international cartels? Does this upswing reflect an increase in international cartel activity affecting the United States; an increase in successful detection, investigation and prosecution by U.S. antitrust authorities; or some combination of these factors? What Antitrust Division policy changes, if any, may be responsible for the recent successful U.S. enforcement record? How important is international cooperation to successful U.S. antitrust enforcement and how can it be usefully expanded? What effect have the recent U.S. enforcement efforts had on other countries? Several of these questions simply cannot be answered in a definitive fashion. Some preliminary observations are possible, however.

#### **An Increase in Cartels or in Detection?**

The Advisory Committee recognizes that scholarship on the incidence of international cartels is divided. Some have argued that price-fixing attempts never declined after World War II, but simply went underground.<sup>36</sup> Others have argued that effective international collusion has declined since its apparent heyday in the first half of the 20<sup>th</sup> century.<sup>37</sup> And some industries have shown a

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<sup>35</sup> Klein, *Lessons From the Battlefield*, at 11.

<sup>36</sup> See MIROW AND MAURER, *WEBS OF POWER*, at 8-9.

<sup>37</sup> One scholar notes that examples of international cartels “still turn up” but there is no comparison with the extent of such activity before World War II, explaining:

During 1945-55, many U.S. MNEs [multinational enterprises] were successfully prosecuted under the antitrust laws for their earlier collusive behavior. ... After World War II many countries passed antitrust laws, and if these varied in toughness and degree of enforcement, they were still tougher than nothing at all. Partly in response to antitrust prosecutions, partly seizing the opportunity opened by the wartime destruction of their European competitors, U.S. MNEs shifted from cooperative behavior to aggressive behavior during 1955-65 and rapidly expanded the number of standardized product lines (i.e., not intensive in R&D) that they produced in Europe. With the successful recovery of Europe and Japan, far more ‘significant’ companies ... came to operate worldwide in most countries than before World War II, and seller concentration measured at the world level probably declined in many of the more concentrated industries. Finally, the mix of important industries has shifted from those producing homogeneous primary materials (wherein the gap between collusive and rivalrous profit is apt to be large) toward those producing differentiated or heterogeneous goods (in which the differentiation supplies natural insulation to the individual seller while complicating the maintenance of collusion).

pattern of recurring cartel activity over the years. Certainly the recent U.S. cartel record indicates that the incidence of detected international cartel activity may be increasing, and some scholarship supports this interpretation of events.<sup>38</sup> The clandestine nature of cartels may make it impossible to determine the truth, but the record shows that international cartels remain a real problem at this time.

The Advisory Committee invited several economists to consider the recent record of prosecution. The resulting comments suggest that increased globalization can work in both directions, and not surprisingly the assessment will be very case specific. For example, alliances between competitors may make communication easier, which in turn tends to support more collusive market outcomes. The increasing ease and speed of communication, however, can also help buyers gain information on pricing from a variety of competitors, a fact that would tend to undermine pricing discipline and collusive behavior. Similarly, some markets have become vastly more competitive, while others have gradually become more concentrated and perhaps more susceptible to collusive activity.<sup>39</sup>

A more complete assessment of the incidence of private international cartels is beyond the capabilities of this Advisory Committee. Nonetheless, this Advisory Committee believes that the scope and incidence of international cartels are important matters for further examination and recommends further consideration of this issue by governments and other experts.<sup>40</sup>

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RICHARD CAVES, *MULTINATIONAL ENTERPRISE AND ECONOMIC ANALYSIS* (2d ed. 1996) 92-93.

<sup>38</sup> Some experts argue that cartels continue to flourish and prosper. Maurice Guerrin and Georgios Kyriazis, *Cartels: Proof and Procedural Issues*, 16 *FORDHAM INTL L. J.* 266, 269. Others maintain that cartels or cartel-like behavior is reappearing, although the forms may be different than in earlier periods. See Isaiah Litvak and Christopher Maule, *Cartel Strategies in the International Aluminum Industry*, 2 *ANTITRUST BULL.* 641-663. While the World Trade Organization focused on a separate point, asserting that, "[w]hile the extent of cartel activities is intrinsically difficult to assess ... there are some indications that a growing proportion of cartel agreements are international in scope." *Chapter Four: Special Study on Trade and Competition Policy*, WTO ANNUAL REPORT FOR 1997, at 12.

<sup>39</sup> See Panel on International Cartels in a Global Economy, ICPAC Hearings (Nov. 4, 1998), Hearings Transcript at 7-72 [hereinafter *Cartel Panel*, ICPAC Hearings]; Simon J. Evenett & Valerie Y. Suslow, *The Empirics of Private Restraints and International Trade: What can Policymakers Learn from the Economic Literature* (draft), submitted by the authors for inclusion in the Advisory Committee record (Sept. 23, 1999).

<sup>40</sup> Such a course of inquiry has precedents. Both the U.S. and the British governments have undertaken studies of this kind in the past. For example, the U.S. Department of Justice and the U.S. Department of Commerce both undertook studies 1929 and 1944, respectively, on cartels and their impact on U.S. commerce. See *supra*, fn. 10. The British government, for its part, undertook a study that attempted to cover all private international industrial price-fixing agreements to which British firms were members. The authors assembled a sample of cartel activity across 125 products. GREAT BRITAIN BOARD OF TRADE, 1 *SURVEY OF INTERNATIONAL CARTELS AND INTERNAL CARTELS* (London: Central Library, Department of Industry, 1944 and 1946) xiii, xxxi. There have also been quite a few empirical studies undertaken by economists and other experts. In the U.S., Richard Posner's pathbreaking study examined the characteristics of firms prosecuted for price-fixing by the Antitrust Division. Posner, *A Statistical Study of Antitrust Enforcement*, 13 *J.L. & ECON.* 365-419 [hereinafter Posner, *Statistical Study*]. So do subsequent analyses by: George A. Hay and Daniel Kelly, *An Empirical Survey of Price Fixing Conspiracies*, 17 *J.L. & ECON.* 13 (1974); Peter Asch



## **Changes in U.S. Enforcement Policy**

Although it cannot be conclusively determined whether the number of international cartels has increased during the past decade, there is no doubt that the outcome of U.S. antitrust enforcement efforts against international cartels has improved. Greater detection and access to information necessary for prosecution appears to be attributable at least in part to several shifts in U.S. enforcement policy, including revisions of the Antitrust Division's leniency policies;<sup>41</sup> the enhanced capacity to preadjudicate the immigration status of potentially cooperating foreign individual defendants;<sup>42</sup> and a heightened emphasis on cooperation and coordination of efforts with other U.S. government authorities, including the FBI.

The Corporate Leniency Policy, as revised in 1993 (also known as the "Amnesty Program"), contains three significant aspects. First, *automatic amnesty* from prosecution and criminal penalties is available to a company that meets the program's requirements and comes forward before an investigation is begun. Automatic amnesty guarantees a grant of amnesty and eliminates any possible exercise of prosecutorial discretion. Second, possible *alternative amnesty* is available to companies meeting certain requirements even if cooperation begins after an investigation is underway. Third, *corporate directors, officers, and employees will receive automatic amnesty* if the corporation qualifies for the same. Amnesty remains unavailable to corporate "ring-leaders."<sup>43</sup> The automatic and alternative amnesty provisions are detailed in Annex 4-B hereto.

Moreover, under the Amnesty Program, the Antitrust Division's policy is to treat as confidential the identity of amnesty applicants and any information obtained from the applicant. Thus, it will not disclose an amnesty applicant's identity absent prior disclosure by or agreement with the applicant, unless authorized by court order. Consistent with this policy, and in order to protect the integrity of the Corporate Amnesty Program, the Antitrust Division has adopted a policy of not disclosing to foreign authorities, pursuant to cooperation agreements, information obtained

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and Joseph J. Seneca, *Characteristics of Collusive Firms* 23 J.L. & ECON. 223 (1975); and Arthur G. Fraas and Douglas F. Greer, *Market Structure and Price Collusion: An Empirical Analysis*, 26 J.L. & ECON. 21, among others. Clearly, because cases produce a great deal of data, even these economists note that many of these cartel data sets are plagued with measurement error, unobservable variables, and sample bias (e.g., whether samples of firms are collusion-prone or prosecution prone). See Posner, *Statistical Study*.

<sup>41</sup> U.S. Department of Justice Antitrust Division, CORPORATE LENIENCY POLICY (August 10, 1993) [hereinafter CORPORATE LENIENCY POLICY]; U.S. Department of Justice Antitrust Division, INDIVIDUAL LENIENCY POLICY (August 10, 1994).

<sup>42</sup> Memorandum of Understanding Between The Antitrust Division, U.S. Department of Justice and The Immigration and Naturalization Service, U.S. Department of Justice (March 15, 1996) to establish a protocol whereby the immigration status of a cooperating alien can be pre-adjudicated before the witness pleads to a criminal violation of the U.S. antitrust laws.

<sup>43</sup> See CORPORATE LENIENCY POLICY Part "A" (setting forth terms for automatic amnesty); CORPORATE LENIENCY POLICY Part "B" (setting forth terms for alternative amnesty).



from an amnesty applicant unless the amnesty applicant agrees first to the disclosure. These are important inducements for firms to seek amnesty and provide full cooperation to the Antitrust Division, especially because international cartels are under increasing scrutiny by antitrust authorities in other jurisdictions as well as the United States.<sup>44</sup>

These revisions have proved instrumental in the Division's recent successes and the Antitrust Division has taken many steps to publicize widely how they can increase opportunities for cartel participants to report on their own role in criminal antitrust activities and cooperate with the Antitrust Division.<sup>45</sup> Under the previous policy, which had been in effect for 14½ years, the grant of amnesty was not automatic. Rather, it was dependent upon prosecutorial discretion based on a series of seven factors and it was available only to those who came forward before the Division had initiated an investigation. Commenting on the revisions, then-Assistant Attorney General Anne Bingaman declared that she thought that the longstanding policy of denying amnesty to any corporation once an investigation was underway was too rigid and might be depriving the Antitrust Division of additional cooperation that would, on balance, serve the public interest.<sup>46</sup>

After the revised program was announced, the number of amnesty applications quickly increased from approximately one a year to more than one a month. By 1998, the Antitrust Division reported it was receiving approximately two applications a month. The violations reported through the Amnesty Program led to some of the Division's largest prosecutions, including the *Graphite Electrodes* and *Vitamins* cartels discussed above. In tandem with the recognizable threat of steep fines resulting from prosecutions, the revised Corporate Leniency Policy is providing important incentives for multinational firms involved in international cartels to approach the Antitrust Division early and reveal their own wrongdoing and that of their co-conspirators.<sup>47</sup> Members of the private

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<sup>44</sup> Gary R. Spratling, *Negotiating the Waters of International Cartel Prosecutions: Antitrust Division Policies Relating to Plea Agreements in International Cases*, presented at the American Bar Assoc. Criminal Justice Sec., 13th Annual National Inst. on White Collar Crime (Mar 4, 1999) 10-12 [hereinafter Spratling, *Negotiating the Waters*]. Some corporations, mostly publicly traded companies, have made public the fact of their participation in international cartel activities and their receipt of amnesty under the Corporate Leniency Policy. In such circumstances the Antitrust Division might identify these firms (although not the specific cooperation received) in subsequent public statements. In situations where a corporate defendant does not receive amnesty and instead enters into a plea agreement, its identity and the terms of the plea agreement will be public. The confidentiality of materials produced by a defendant pursuant to a plea agreement hinges on the applicability of those safeguards and statutory protections available to all materials the Antitrust Division or a grand jury receives in the course of a criminal investigation.

<sup>45</sup> Further, Antitrust Division officials report that, "[t]oday, the Amnesty Program is the Division's most effective generator of large cases." Gary R. Spratling, *Making Companies an Offer They Shouldn't Refuse: The Antitrust Division's Corporate Leniency Policy -- An Update*, speech before the Bar Assoc. of D.C.'s 35<sup>th</sup> Annual Symposium on Associations and Antitrust, (Feb. 16, 1999) 2 [hereinafter, Spratling, *Corporate Leniency (Update)*].

<sup>46</sup> Bingaman, *Change and Continuity*.

<sup>47</sup> Spratling, *Corporate Leniency (Update)* at 1 ("companies have come to understand that acceptance into the Amnesty Program can potentially save a firm tens of millions of dollars in fines and can eliminate the threat of prosecution and

bar also give credit to these factors for the recent surge in international cartel prosecutions.<sup>48</sup> Moreover, it appears that the voluntary nature of the amnesty policy is particularly relevant in the international context, where history teaches that tensions over issues of sovereignty might otherwise potentially arise if U.S. assertions of jurisdiction in cartel investigations were perceived as overreaching.

In 1999, the Antitrust Division formally announced that the Corporate Leniency Policy had been extended to include a new “Amnesty Plus” provision. This development occurred because over half of the Antitrust Division’s international cartel investigations were initiated when cooperating witnesses in an ongoing investigation into cartel activities in an unrelated industry.<sup>49</sup> The new policy is designed to build on this experience by proactively attracting amnesty applications from targets of ongoing antitrust investigations, encouraging them to consider whether they may qualify for amnesty in other markets where they operate when they apply for favorable treatment in exchange for cooperation through a plea agreement with the Antitrust Division in an ongoing investigation. If a corporation meets the seven mandatory factors for amnesty eligibility in the subsequent investigation, including the “first in” test, it will receive amnesty protection. Additionally, the Division will credit the corporation for its cooperation by giving it a substantial additional discount in calculating the fine recommended in the initial investigation.

The large U.S. anticartel prosecutions of the last five years also are distinguished by heavy reliance by Antitrust Division on plea agreements with firms and their key executives who do not qualify for amnesty (including situations where the firm is not “first in”). In light of the steep fines secured in the majority of recent international anticartel prosecutions, a firm that qualifies for amnesty and therefore pays no fines clearly gains substantial cost savings in addition to protection from prosecution for all corporate executives. A firm that enters into a plea agreement and cooperates early in an investigation may also face significantly reduced fines. Department of Justice agreements to recommend reduced sentences in these and other circumstances, such as when it applies the amnesty-plus policy, appear to have been successful in encouraging cooperation from individual defendants.<sup>50</sup> Reduced sentencing agreements have also been used where the cooperating defendant plays a substantial role in securing the cooperation of other co-conspirators as well as providing substantial assistance in the investigation.<sup>51</sup> To protect cooperating firms from possible

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incarceration for the firm’s culpable executives.”)

<sup>48</sup> Cartel Panel, ICPAC Hearings, at 22-70.

<sup>49</sup> Spratling Corporate Leniency (Update), at 6-7.

<sup>50</sup> At the Advisory Committee’s 1998 Hearings, members of the private bar praised the effectiveness and usefulness of the Amnesty Program. See Cartel Panel, ICPAC Hearings, at 7-72.

<sup>51</sup> See, e.g., *U.S. v. Haarmann & Reimer Corporation*, No. CR 97-00019 THE (D.C. N.D. Cal., 1997) (Firm’s cooperation in securing the cooperation of other citric acid cartel participants and in the investigation resulted in Antitrust Division requesting a downward departure for the firm’s fine, calculated under the U.S. Sentencing



treble-damage suits lodged by private litigants in the United States, the Antitrust Division as a matter of general policy will accept foreign-located information as produced in response to an applicable grand jury subpoena, thus subjecting it to the same strict safeguards applied to grand jury materials under Rule 6(e) of the Federal Rules of Criminal Procedure.<sup>52</sup>

Moreover, to ensure that a criminal conviction does not result in deportation and permanent exclusion from the United States of a cooperating individual defendant, in 1996 the Antitrust Division also obtained the ability to offer cooperating individuals an opportunity for the Immigration and Naturalization Service (INS) to reach a final adjudication on their immigration status prior to before they enter into a plea agreement in the underlying antitrust prosecution. The Antitrust Division reports that the options made possible under this memorandum of understand (MOU) are instrumental in every international antitrust matter before the Division since the MOU was signed, as considerations of freedom to travel in and out of the United States are important to every foreign individual defendant's decision to cooperate with the U.S. government, as well as to decisions by foreign corporate defendants about whether to seek plea agreements.<sup>53</sup>

Further, the Antitrust Division credits its increased cooperation with other branches of the government as another important factor in the recent success record of international anticartel prosecutions. In 1995, the Division announced its "Generating Quality Criminal Cases Initiative," a policy to revitalize cooperation and coordination with other U.S. government authorities, including the FBI, and as a result to obtain more referrals of possible antitrust crimes from other investigative and prosecutorial agencies.<sup>54</sup>

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Guidelines.) Gary R. Spratling, then-Deputy Assistant Attorney General for Antitrust, U.S. Department of Justice, Criminal Antitrust Enforcement Against International Cartels, before the Advanced Criminal Antitrust Workshop: A Practical Approach to Criminal Investigations (February 21, 1997) at 12 (describing the Antitrust Division's new policy in this regard and cautioning that "there is a maximum of only one such 'extra credit' per investigation, and it goes to the firm that takes the lead in securing multi-firm cooperation.") *Id.*

<sup>52</sup> Spratling, *Negotiating the Waters*, at 5-6. A similar policy is applied by U.S. antitrust authorities in multijurisdictional merger review matters in which the parties sign a voluntary waiver of confidentiality protections to permit the U.S. authorities access to relevant information in the possession of another antitrust authority. In order to bring the information under the Hart-Scott-Rodino Act, 15 U.S.C. §15a, §7a of the Clayton Act, protections against disclosure, where applicable, the United States will seek to have the party produce to it a duplicate of the information in the files of the other antitrust authority.

<sup>53</sup> U.S. Department of Justice, Antitrust Division, Office of Criminal Enforcement; *See* Spratling, *Titanic*.

<sup>54</sup> These agencies include the U.S. Attorneys' Offices, the Fraud Section of the Criminal Division, the Federal Bureau of Investigation and the Inspector Generals' Offices of federal agencies, as well as the Border Watch section of the INS. These organizations, often obtain evidence of conduct that amounts to criminal antitrust violations in the course of investigations in their particular areas of responsibility,, and the Initiative established a liaison procedure whereby these offices refer leads or information concerning possible antitrust violations to the Antitrust Division. In addition, the Division's field offices have conducted training sessions for U.S. Attorneys and FBI offices, and an FBI agent is detailed to work in most Antitrust Division field offices at all times. Moreover, FBI agents now serve as case agents in every international matter. *See* Spratling *Titanic* at 9-10.

## **Interagency Anticartel Enforcement Cooperation**

Over the past decade, U.S. antitrust authorities have publicly acknowledged the important role of interagency enforcement cooperation in several criminal cartel matters. Further, even when U.S. agencies do not receive any overt cooperation from another jurisdiction, they have been relatively unhindered during the last two or more decades by application of blocking statutes and other affirmative tools in opposition to U.S. international investigations. Indeed, other jurisdictions are beginning to investigate and take actions against a number of the same cartels that the United States has prosecuted, as described more fully below. In this sense, a spirit of cooperation appears to be growing, at least between the United States and the EU, as well as with several individual nations, including Australia, Canada, and some EU Member States including Germany, and the United Kingdom (UK), Israel, and Japan, with respect to hard core cartel cases that are seen as causing consumer harm in the U.S. and abroad.

As a general matter, while enforcement assistance is available under the bilateral antitrust agreements that the United States has signed with Brazil, Canada, the European Union, Germany, Israel, and Japan,<sup>55</sup> it is also limited in scope and does not extend the ability of U.S. antitrust authorities to compel production of information from overseas corporations or individuals, or to access confidential information held by sister competition authorities. The only formal antitrust-specific agreements under which such material may be obtained are those negotiated under the International Antitrust Enforcement Assistance Agreement of 1994 (IAEAA).<sup>56</sup> Mutual legal assistance treaties in criminal matters (MLATs) offer a separate formal treaty mechanism under which assistance in criminal antitrust matters may be available, including assistance in compelling production of materials and obtaining access to confidential investigative information from sister antitrust authorities.<sup>57</sup> Finally, in limited circumstances, U.S. antitrust agencies may obtain such

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<sup>55</sup> Described in detail in Annex 1-C hereto. As of December 31, 1999, the agreements with Israel and Brazil were signed but not yet in force.

<sup>56</sup> Pub. L. No. 103-438 (1994), 108 Stat. 4597, 15 U.S.C. §§6200-6212. Congress enacted the IAEAA in 1994, to address statutory limitations on the U.S. antitrust authorities' ability to request assistance in obtaining access to and otherwise exchanging confidential information, among other things. Under the IAEAA, U.S. antitrust authorities can negotiate written agreements under which they can exchange confidential information during the course of civil or criminal antitrust investigations subject to certain conditions, including a requirement that the requesting authority be able to reciprocate to a U.S. request for assistance. Much of the IAEAA is concerned with protection for information such as confidential investigatory or law enforcement material, as well as business confidential and statutorily or otherwise privileged information. One consequence is that confidential information obtained in a Hart-Scott-Rodino premerger notification process is protected from disclosure under any IAEAA agreement. A fuller description appears in Annex 1-C hereto.

<sup>57</sup> As of January 1, 2000, the United States had 30 MLATs in place and while another 21 were awaiting entry into force. Many of these treaties apply to criminal antitrust matters.



information through traditional international law means, such as diplomatic channels or court-to-court letter rogatory requests.<sup>58</sup>

Below are several public examples of interagency assistance that the Antitrust Division has received in connection with its recent international cartel investigations. The sensitive nature of criminal investigations limits the amount of information that the Antitrust Division can publicize about them. Accordingly, these illustrations can be understood to reflect only part of the full amount of assistance U.S. antitrust authorities are receiving from overseas enforcement authorities.

#### *U.S. Antitrust Enforcement Cooperation Through MLATs*

There are only three instances of publicly disclosed details about international cooperation provided to U.S. antitrust authorities pursuant to MLAT requests, all involving requests to Canada. Antitrust Division officials describe their successes using the MLAT and other enforcement assistance agreements with Canada as illustrating the extent to which cross-border cooperation can enhance enforcement of domestic antitrust laws.<sup>59</sup>

In two examples, *Thermal Fax Paper* and *Disposable Plastic Dinnerware*, U.S. antitrust enforcers relied on evidence obtained through assistance from Canadian authorities in bringing these cases to their final disposition. In the *Thermal Fax Paper* case, the United States and Canada conducted joint interviews of potential witnesses and coordinated their subpoena efforts. The United States was also able to access Canada's database of documents and information.<sup>60</sup> In the *Disposable Plastic Dinnerware* investigation, pursuant to an MLAT request from the United States and through execution of domestic search warrants, simultaneous raids took place on conspirators' offices in Montreal, by the Royal Canadian Mounted Police, and in California, Massachusetts and Minnesota, by the FBI. In the *Ductile Pipe* cartel, again, the U.S. and Canadian antitrust authorities conducted parallel investigations resulting in the Division receiving Canadian-located evidence from the Canadian government, pursuant to an MLAT request. This evidence was in the files of the

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<sup>58</sup> Letters rogatory are traditional interjurisdictional court-to-court requests for assistance (available for use in criminal or civil matters). 28 U.S.C. §1781 (Transmittal of letter rogatory or request), §1782 (Assistance to foreign and international tribunals and to litigants before such tribunals). (West, 1999).

<sup>59</sup> Treaty on mutual legal assistance in criminal matters, Jan. 24, 1990, U.S.-Can., TIAS. Other agreements include the 1995 U.S.-Canada bilateral antitrust agreement, which includes positive comity provisions (superceding a 1984 agreement and several other prior arrangements), Agreement Between the Government of The United States of America and The Government of Canada Regarding the Application of Their Competition and Deceptive Marketing Practices Laws (1995), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,503A; and the Treaty on Extradition, Mar. 22, 1976, U.S.-Can., TIAS 8237, as amended by Protocol and exchange of notes, Jan. 11, 1988, 27 I.L.M. 422.

<sup>60</sup> The nature of the assistance received by the Division from Canada was set out in detail in a U.S. filing in one of the *Thermal Fax Paper* cases, concerning the government's obligations under *U.S. v. Brady* with respect to Canadian documents received by the United States during its investigation. United States' Petition for Clarification And/or Reconsideration of the Court's Order Regarding Further Discovery, filed in *United States v. Nippon Paper Industries Co.*, Criminal No. 95-10388-NG (D.Mass.)

Canadians after having been obtained in the course of their own investigation, pursuant to a Canadian warrant-based search of corporate premises in that country. Ultimately, however, The Division concluded that it did not have sufficient evidence to prosecute under U.S. law.<sup>61</sup>

*Antitrust Enforcement Assistance Through Traditional International Law Mechanisms*

There are similarly only a few public examples of U.S. antitrust investigations benefiting from assistance received through traditional international law mechanisms. In 1994 the Antitrust Division used diplomatic channels to ask the Government of Japan for investigative assistance in obtaining evidence located in that country in connection with *Thermal Fax Paper* investigation<sup>62</sup> In keeping with a domestic law permitting assistance to foreign authorities in certain criminal matters,<sup>63</sup> the Japanese Prosecutor's Office raided and seized documents from the Tokyo headquarters of two Japanese companies, secured the cooperation of other Japanese companies from which the United States sought additional documents, and questioned representatives of Japanese thermal fax paper manufacturers in the presence of representatives of the Antitrust Division.<sup>64</sup>

In the *Industrial Diamonds* criminal price-fixing case against General Electric and DeBeers,<sup>65</sup> the Belgian Judicial Police agreed to carry out a search and conduct a witness interview in Brussels, although the putative witness (who was eventually indicted) moved to France just before the interview. In addition, two Belgian judicial police officers traveled to Ohio in 1994 to testify for the United States at the trial of defendant General Electric regarding certain relevant activities that had occurred in Belgium.

One significant hurdle that continues to confront U.S. antitrust authorities is that only a limited number of jurisdictions have legal systems that enable them to allow foreign antitrust authorities access to confidential law enforcement or statutorily protected information, or to exercise compulsory powers to obtain evidence for use in another jurisdiction's antitrust actions. Canada may provide such assistance to the United States under the U.S.-Canada MLAT. Australia is one of the

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<sup>61</sup> The Canadian authorities, however, assembled a different body of evidence that was sufficient to obtain a guilty plea in September 1995 from a Canadian subsidiary of a U.S. firm to a charge of conspiring to cut off supplies of U.S.-made ductile iron pipe to a Canadian rival. The defendant paid a then-record criminal fine of CDN\$2.5 million.

<sup>62</sup> The Government of Japan described its assistance in its brief of amicus curiae in opposition to jurisdictional arguments made by U.S. antitrust authorities in *United States v. Nippon Paper Industries Co.*, No. 96-2001 (1<sup>st</sup> Cir., filed Nov. 18, 1996) at 4.

<sup>63</sup> Japanese Law for International Assistance in Investigation (Law No. 69 of 1980), *repub'd. in* CRIMINAL JUSTICE LEGISLATION OF JAPAN (United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders) (translation) 303.

<sup>64</sup> Brief of amicus curiae of the Government of Japan, *United States v. Nippon Paper Industries Co.*, No. 96-2001 (1<sup>st</sup> Cir., filed Nov. 18, 1996), at 4.

<sup>65</sup> *United States v. General Elec. Co.*, 869 F. Supp. 1285 (S.D. Ohio 1994).



few jurisdictions with a law in place that empowers its antitrust authorities to participate in enforcement cooperation on this level, under specific conditions (that law enabled the Australian Competition Commission to enter into its 1999 IAEAA agreement with U.S. antitrust authorities).<sup>66</sup>

At the same time, competition officials in a number of countries appear to be interested in expanding the number of bilateral antitrust agreements to which they are a party and deepening the range of areas of coverage, at least with the United States.<sup>67</sup> At ICPAC hearings in November 1998, for example, Canadian, EU, and other officials indicated their interest in exploring possibilities for IAEAA agreements with the United States; the EU also expressed interest in an MLAT.<sup>68</sup>

The Antitrust Division also indicates that it has received assistance through MLAT requests in criminal antitrust investigations that have not been made public and, further, that it has used informal mechanisms on a case by case basis to elicit aid from foreign governments in its enforcement efforts. Despite this assistance, U.S. antitrust acknowledge that significant obstacles remain to U.S. antitrust investigatory efforts.

Based on the evidence, recent U.S. achievements in prosecuting international cartels suggest that while foreign assistance has and can facilitate antitrust enforcement efforts, only periodically does it prove crucial to their outcome. At the same time, the Antitrust Division asserts that while international cooperation has been important in a number of investigations -- many of which involve huge amounts of commerce -- it is the *unavailability* of cooperation that has stalled investigations temporarily or permanently because the Antitrust Division is unable to otherwise access information located overseas.<sup>69</sup> Given the history of barriers to U.S. antitrust enforcement efforts and the fact that, even though more jurisdictions are recognizing the legitimacy of such efforts, only a handful

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<sup>66</sup> Described in detail in Annex 1-C. Mutual Assistance in Business Regulation Act 1992 and the Mutual Assistance in Criminal Matters Act 1987, and Regulations made pursuant to those Acts. See Article I "Definitions" of the Mutual Antitrust Enforcement Assistance Agreement Between the Government of the United States of America and the Government of Australia and Annex (Apr. 27, 1999). In addition, the Netherlands has recently enacted legislation under which its antitrust authorities are empowered to enter into cooperation agreements with other jurisdictions akin to those contemplated by the IAEAA. Chapter 11, Art. 91 of The Dutch Competition Act (*Wet economische mededinging*) of May 22, 1997, at < [www.nma-org.nl](http://www.nma-org.nl) >.

<sup>67</sup> Some jurisdictions other than the United States have their own active bilateral cooperation agenda. The EC is the most noteworthy example, having entered into bilateral cooperation agreements with the United States, described in Annex 1-C, and with Canada, Agreement between the European Communities and the Government of Canada regarding the application of their competition laws (June 17, 1999). Within the Community, several cooperation agreements between Member States are in place. Additionally, Australia has been active on this front, signing agreements with the United States and providing for competition law cooperation in its 1994 agreement with New Zealand and in a bilateral competition assistance agreement with Taiwan (1996). New Zealand has also entered into a bilateral antitrust cooperation agreement with Taiwan (1997).

<sup>68</sup> Panel on Current U.S. Bilateral Agreements, ICPAC Hearings (Nov. 2, 1998), Hearings Transcript at 106-160.

<sup>69</sup> U.S. Dep't. of Justice, Antitrust Division, Office of Criminal Enforcement.

have legal or judicial mechanisms in place through which extensive assistance can be made available, it stands to reason that U.S. investigative efforts to obtain necessary or timely access to information from abroad will be hindered from time to time.

One mechanism to overcome any such impediments is to encourage voluntary cooperation from targets of investigations. In cartel prosecutions, the Antitrust Division's leniency policies have provided U.S. antitrust authorities with a virtual longpole -- enabling it to vault a number of the more traditional barriers to its international enforcement efforts. Significantly, this has occurred without offending the sovereign interests of other jurisdictions to the same degree that can arise in the context of extraterritorial enforcement. Some of the persistent concerns associated with international enforcement are sidestepped when a firm or an individual cooperates pursuant to a leniency policy, including issues of personal jurisdiction, service of process, and access to foreign-located evidence and individuals, as well as the possibility of witnesses who provide voluntary cooperation outside a grant of leniency actually delivering the full amount of cooperation pledged. In sum, it appears that unilateral policy measures undertaken by U.S. antitrust authorities, most prominently through the Corporate Leniency Policy and the MOU with the INS, are succeeding in overcoming traditional barriers to international law enforcement, at least as long as cartel participants consider the benefits to outweigh the potential costs of prosecution.

### **Anticartel Enforcement in Other Countries**

Recent U.S. cartel cases show that the adverse effects of international cartels are felt by markets around the world, leading to a shift in the way that overseas antitrust authorities react to U.S. antitrust efforts. For many decades, the United States stood almost alone in the world in its commitment to antitrust enforcement, especially when the defendants were located in other countries. In fact, until quite recently, U.S. antitrust investigations into international cartels were met with chilly receptions from other governments.

Over time cartels have been condemned in several fora. For instance, in 1980 the United Nations Conference on Trade and Development (UNCTAD) released a set of nonbinding recommendations for the control of restrictive business practices that include a provision condemning cartels (the Set).<sup>70</sup> While the Set is not a source of international law, it highlights the importance of prohibitions against cartels to those countries that have developed competition laws in the ensuing years. Scores of jurisdictions have adopted competition laws in the last decade, and despite significant differences in the scope of these laws, they demonstrate clear consensus that hard core cartels are pernicious and should be uncovered and stopped.

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<sup>70</sup> "Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices" UNCTAD, UN Doc. TD/RBP/Cons/10 (May 2, 1980) Section D.3., adopted by the U.N. General Assembly on Nov. 12, 1980, UN Doc. A/C.2/35/L.75. See further discussion on UNCTAD in Chapter 5, p. 67.



In 1998 the 29 members of the OECD adopted the Recommendation of the Council Concerning Effective Action Against Hard Core Cartels,<sup>71</sup> the first consensus statement on an approach to international hard core cartels.<sup>72</sup> For the purposes of the Recommendation, a hard core cartel is “an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce ... .”<sup>73</sup> Some, however, argue that this meaning is too permissive of state-supported cartels and should be revised to remove the requirement that cartel activity be anticompetitive.

The Recommendation encourages member countries to adopt competition laws that effectively prohibit and deter hard core cartels and provide for effective sanctions, enforcement procedures, and enforcement institutions, among other things. It states that OECD countries have a common interest in preventing hard core cartels and should cooperate with each other in enforcing their own laws against such cartels, to the extent consistent with each member’s laws, regulations, and important interests. Moreover, the Recommendation encourages member countries to enter into mutual assistance agreements that would permit the sharing of evidence with foreign antitrust authorities, to the extent permitted by national laws, and encourages members to take another look at provisions in their own laws that stand in the way of these cooperative efforts.

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<sup>71</sup> OECD Document No. C(98) 35/FINAL [hereinafter “OECD Hard-Core Cartel Recommendation”]. Additional details on this Recommendation are set forth in Annex 1-C hereto.

<sup>72</sup> A number of considerations led to adoption and issuance of this Recommendation, including the recognition that, “hard core cartels are the most egregious violations of competition law and that they injure consumers in many countries by raising prices and restricting supply, thus making goods and services completely unavailable to some purchasers and unnecessarily expensive for others; and ... that effective action against hard core cartels is particularly important from an international perspective -- because their distortion of world trade creates market power, waste, and inefficiency in countries whose markets would otherwise be competitive -- and particularly dependent upon co-operation -- because they generally operate in secret, and relevant evidence may be located in many different countries.” OECD Hard-Core Cartel Recommendation, introductory recitals.

<sup>73</sup> OECD Hard-Core Cartel Recommendation at § I.A. This language provides a framework definition which, as the subsequent provision in the Recommendation makes clear, will be understood in keeping with the definition of cartel activity under local law in each jurisdiction:

For purposes of this Recommendation ... b) the hard core cartel category does not include agreements, concerted practices, or arrangements that (i) are reasonably related to the lawful realization of cost-reducing or output-enhancing efficiencies, (ii) are excluded directly or indirectly from the coverage of a Member country’s own laws, or (iii) are authorized in accordance with those laws. However, all exclusions and authorizations of what would otherwise be hard core cartels should be transparent and should be reviewed periodically to assess whether they are both necessary and no broader than necessary to achieve their overriding policy objectives. ...

*Id.* at § I.B.

Anticartel laws vary from jurisdiction to jurisdiction and differences between them reflect differences in national legal systems. Many provide for administrative or civil remedies rather than criminal penalties, while others -- including the United States -- criminalize some competition offenses, usually including bid-rigging, price-fixing, and allocation of markets, sales and customers. The fact remains, however, that overall anticartel enforcement levels around the world remain fairly low outside the United States, and that penalties differ significantly in those jurisdictions that have active anticartel programs. Annex 4-B hereto provides a comparison of penalties in selected jurisdictions.

Several jurisdictions have established their own record of anticartel enforcement actions, some of which have followed the United States' prosecutorial lead against international cartels in addition to pursuing a domestic anticartel agenda. Still others are now toughening their existing laws and enforcement programs. Jurisdictions as diverse as Canada, the EC, France, Germany, Israel, Korea, Japan, Mexico, and Spain have brought significant actions against domestic and/or international cartels. Several other countries, including the Netherlands, South Africa, and the UK have recently enacted strong new antitrust laws and are putting anticartel enforcement policies in place. Others, such as Ireland, have issued public notifications that they intend to engage in criminal prosecution of cartel behavior, while some, such as Norway, have begun such a process. Moreover, if imitation is an indication of success, it appears that the Antitrust Division's successes under its Corporate Leniency Policy are being studied to model comparable programs in other jurisdictions; the EC, Canada, and the UK are promulgating and improving their own corporate leniency programs.<sup>74</sup>

A closer look at the anticartel enforcement actions in Canada and the EU -- two of the most active regimes outside the United States in investigating and prosecuting cartels, including international cartels -- might be instructive.<sup>75</sup> Canada has developed a track record over the past several years of pursuing large, international, hard core cartel cases. Since the early 1990s, the

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<sup>74</sup> *European Commission*: Commission notice on the non-imposition or reduction of fines in cartel cases, [1996] O.J. C207/4; Commission Guidelines on the method for the setting of fines [1998] O.J. C9/3. *Canada*: "Cooperating Parties Program," Canadian Competition Bureau (draft for comment, May 7, 1999). A new policy statement is expected to be released by the Competition Bureau early in 2000. Both are posted on the Competition Bureau's Web Site, at <<http://competition.ic.gc.ca>>. *United Kingdom* The UK issued a draft corporate leniency program that it proposes instituting in March 2000, when revisions to the UK competition law go into effect. This program departs from the EC model and is based instead on the U.S. Corporate Leniency Policy. Penalties Under New Competition Law, Office of Fair Trading (May 1999); Competition Act 1998: proposed procedural rules under s.51, Office of Fair Trading. Both are posted on the OFT's Web Site, at <<http://www.offt.gov.uk>>.

<sup>75</sup> In addition, Japan provides an illustration of a jurisdiction that has had anticartel laws in force since after World War II but that has only begun to pursue an active program of anticartel enforcement since 1990. Japan has brought anticartel enforcement actions against domestic cartels during this period, typically for engaging in bidrigging or price-fixing arrangements. Annex 4-C hereto contains charts prepared by the JFTC that illustrate its anticartel activities since the late 1980s: "Japan Fair Trade Commission Enforcement Statistics"; and "Japan Fair Trade Commission Surcharge Statistics." Notably, Japan does not have any program in place like the U.S. Corporate Leniency Program to encourage cartel participants to self-report violations of Japanese anticartel laws.



Attorney General of Canada has prosecuted a number of firms and their key executives for participating in such activities. These prosecutions -- *Thermal Fax Paper*, *Citric Acid*, *Lysine*, *Sodium Gluconate*, *Graphite Electrodes*, *Sorbates*, *Vitamins (Bulk Vitamins and Choline Chloride (B<sub>4</sub>))*, *Ductile Pipe*, and *Insecticides* (all but the last two cases involve products first prosecuted by U.S. antitrust authorities)<sup>76</sup> -- have resulted in the imposition of increasingly steep fines, including the highest ever Canadian fine at CDN\$50.9 million against F. Hoffmann-La Roche in the *Vitamins* and *Citric Acid* proceeding and the first-ever sentencing of an individual to incarceration for involvement in an international cartel.<sup>77</sup> Canada has had an amnesty program since 1991 (first implemented as the Whistle Blower Program in the *Insecticides* case), which was revised and circulated for comment in 1999. A new policy statement, designed to increase predictability and to enhance the program's attractiveness to applicants, is expected to be released at about the same time as this Report.<sup>78</sup> Canadian policy has been heavily influenced by the U.S. Corporate Leniency Policy, particularly by its provision for automatic amnesty.<sup>79</sup> Like its U.S. counterparts, Canadian antitrust authorities have identified their ability to seek investigative and other assistance from the United States under the 1991 antitrust assistance agreement, the MLAT, and the extradition treaty with the United States as important to recent developments in the Canadian antitrust enforcement program.<sup>80</sup>

The EU, working through the European Commission, has developed a strong history of enforcing its anticartel laws and has prosecuted at least 20, mostly internal, cartels since the late 1980s. During this time, the level of fines imposed in these matters has increased sharply. In five matters, total fines imposed were roughly ECU 100 million: *Seamless Steel Tubes* (1999); *Pre-Insulated Pipe* (1999); *Carton Board* (1994), *Steel Beam* (1994), and *Cement* (1994). Further, large fines of ECU 20 million or more have been imposed since 1990 on at least 10 firms for their roles

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<sup>76</sup> See Annex 4-C hereto, "Canadian Competition Bureau Penalties Imposed in Cases Against International Cartels for Violations of the Competition Act International Cartel Fines" prepared by the Competition Bureau. See, A. Neil Campbell, *Canada Gets Serious About Cartels*, 2 INTL. ANTITRUST BULL. 21 (1999).

<sup>77</sup> H.M.R. v. Russell Cosburn (Sup. Ct. of J., Ontario Eastern Reg. File No.: 99/G30978) (Sept. 13, 1999) (sentencing a former Vice President of a Canadian conspirator in the *Vitamins/Choline Chloride (B<sub>4</sub>)* cartel to nine months imprisonment; term ordered to be served in the community rather than jail).

<sup>78</sup> The new information bulletin will be available on the Canadian Competition Bureau's website upon release, at <<http://strategis.ic.gc.ca>>.

<sup>79</sup> In Canada, the Competition Bureau cannot unilaterally implement amnesty. Its policy statement explains the circumstances under which it recommends immunity to the Attorney General of Canada who, as the prosecuting agency for cartel offenses, retains sole discretion to grant immunity. See <<http://strategis.ic.gc.ca>>.

<sup>80</sup> Harry Chandler, Deputy Director of Investigation and Research (Criminal Matters), Canadian Bureau of Competition Policy, *Getting Down to Business: The Strategic Direction of Criminal Competition Law Enforcement in Canada*, speech before Insight and The Globe and Mail Conference "Emerging Issues in Competition Law" 4-5 (Mar. 10, 1994), at <<http://strategis.ic.gc.ca>>.

in European cartels.<sup>81</sup> In its *Pre-Insulated Pipe* decision, the EC imposed a fine of ECU 70 million against a single defendant, the largest fine ever in a cartel matter.<sup>82</sup> During the 1990s, the EC instituted several policies to build up its anticartel program. In July 1996 the EC announced its leniency policy notice.<sup>83</sup> The policy is intended to discourage firms from participating in cartels while encouraging them to denounce such activities to the Commission, and follows the lead of the United States.<sup>84</sup> It had been applied in five cartel cases as of the end of 1999, each time resulting in downward adjustments of fines.<sup>85</sup> In January 1998, the EC published Guidelines on the method of setting fines imposed for infringements of competition laws.<sup>86</sup> While publication of the Guidelines was intended to improve the transparency and effectiveness of the Commission's decisionmaking practice in applying its leniency policy, they have proved controversial and provoked concern about less-than-predictable results, particularly because determinations of whether and to what extent to provide leniency are not made until the conclusion of the EC's proceeding in a matter.<sup>87</sup> While it is notable that the EC has a very low incidence of prosecuting cartels outside its borders, this may

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<sup>81</sup> In its 1998 Guidelines on the method for the setting of fines, the EC set forth its method for determining the level of fines pursuant to Article 15 (2) of the Treaty of Rome. Infringements are categorized as "minor," "serious" or "very serious," with price-fixing arrangements generally captured by the latter category and the anticipated fine levels for such violations *above* ECU 20 million. [1998] O.J. C9/3.

<sup>82</sup> This fine was imposed on ABB Asea Brown Boveri. Commission decision of 21 Oct. 1998, Case No. IV/35.691/E-4, *Pre-Insulated Pipe Cartel*, O.J 1999 L 24/1 (fining 10 companies a total of ECU 92 million for engaging in a secret cartel engaged in price-fixing, market allocation, and bid-rigging).

<sup>83</sup> Commission notice on the non-imposition or reduction of fines in cartel cases, [1996] O.J C207/4.

<sup>84</sup> Testimony of Karel Van Miert, then-EC Competition Commissioner, ICPAC Hearings (Nov. 2, 1998), Hearings Transcript at 154 (describing how the EC was inspired to institute its policy by the advantages evident from the United States' experience with its Corporate Leniency Policy).

<sup>85</sup> *Seamless Steel Tubes, Stainless Steel, Pre-Insulated Pipes, British Sugar, and Greek Ferries*. Nonetheless, it remains unclear whether firms will increasingly seek leniency under the program for a number of reasons, especially because the program does not provide for a resolution up front of the degree of leniency a cooperating firm will receive. The Leniency Notice identifies three different levels of cooperation from firms involved in a cartel that may lead to reductions in fines, with the most substantial reductions for firms that self-report and then cooperate prior to the Commission instituting an investigation. Commission notice on the non-imposition or reduction of fines in cartel cases, [1996] O.J C207/4. While reductions for such cooperation may be as high as 100 percent, the Commission will not give any indication of the rate of reduction while it conducts its investigation and proceeding, and insists that the leniency is distinct from plea bargaining. Accordingly, firms are left in the potentially difficult position of deciding whether self-incrimination is actually worthwhile. See Mercedes Garcia Perez, *Too fine a line? Commission fining policy in competition cases considered*, 31 EU FOCUS 2, 4 (1999) (discussing these and other concerns firms have in contemplating self-reporting under the EC Leniency program).

<sup>86</sup> [1998] O.J. C9/3.

<sup>87</sup> See Paul Spink, *Recent Guidance on Fining Policy*, 2 E.C.L.R. 101 (1999) (offering a summary of a number of these concerns)



be changing.<sup>88</sup> For example, the EC issued a decision in December 1999 in the *Seamless Steel Tubes* matter which involved four firms from Member States and four Japanese firms. Moreover, the Commission is currently investigating some of the same international cartels as prosecuted in the United States and Canada, including the *Graphite Electrodes* and *Vitamins* conspiracies.

### *Assessment of Recent Trends*

In a word, it appears that interest in enforcement is growing in many jurisdictions around the world and that U.S. experiences are receiving close scrutiny. The scrutiny is prompting a favorable response in at least a few jurisdictions who are also publicly considering follow-on investigations of some of the international cartels prosecuted in the United States, as mentioned in the discussion above. It is interesting to note that a number of jurisdictions are putting information regarding their enforcement programs and policies (including their leniency policies) on their Internet websites in an effort to increase the transparency of their practices. Moreover, several jurisdictions are including translations into other languages, particularly English, for key materials posted on their websites.<sup>89</sup>

Additional efforts will doubtless be necessary to foster discussion and awareness among enforcement authorities and, equally important, corporations and consumers in their home markets. A recent initiative by the Antitrust Division to host a two-day International Cartel Enforcement Workshop in Washington D.C., appears instructive as a mechanism for fostering discussion and awareness about the far-reaching deleterious effects of international cartels and the advantages that cooperation may offer to enforcement authorities. Panelists from more than a dozen different enforcement agencies led discussions on topics ranging from leniency policies, to investigatory and prosecutorial mechanisms and policies, to cooperation among antitrust agencies in cartel cases, to methods of building an anticartel enforcement program.<sup>90</sup>

### **Greater Cooperation Through Increased Awareness**

The recent record shows that international cartels are a serious problem with pernicious effects on the U.S. and foreign markets. The adverse effects of these arrangements are being felt not only by consumers around the world, but also by the businesses and governments that rely on the cartelized inputs. Accordingly, the Advisory Committee recommends that the United States expand its efforts to increase public knowledge and awareness, at home and abroad, of the deleterious

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<sup>88</sup> With its 1988 decision in the *Wood Pulp Case*, the EC established application of Community anticartel law to offshore conduct. *A. Ahlstrom Osakeyhtio v. Commission*, [1988] E.C.R. 5193.

<sup>89</sup> A few examples include websites of the competition authorities in Israel, The Netherlands, Switzerland, and Turkey.

<sup>90</sup> Assistant Attorney General Klein commented on this event shortly after it took place, saying, "there is a separate and critical role for programs like this one -- programs devoted to the real nitty gritty of law enforcement against international cartels, where frontline enforcers can meet one another and try to solve common practical problems." Klein, *Lessons From the Battlefield*, at 14.

consequences of cartels. Moreover, U.S. enforcement actions against cartels appear to be generating considerable interest among enforcement officials around the world, and the climate has improved significantly for cooperation. The Advisory Committee hopes that the United States will be able to build on the prevailing climate favoring international antitrust enforcement cooperation by sharing its recent experiences with foreign authorities in informal fora -- like its 1999 International Cartel Enforcement Workshop, or the annual Fordham Corporate Law Institute Conference on International Law and Policy that is regarded as an institution in its own right. The United States should also take advantage of opportunities for cooperation building offered in formal settings, such as at the OECD or at conferences on point organized by the World Trade Organization (WTO) or antitrust bar associations. All of these efforts to ensure that U.S. enforcement policies are well understood abroad will enhance the credibility of the U.S. enforcement effort and promote cooperation at the same time.

### THE USE AND MANAGEMENT OF CONFIDENTIAL INFORMATION

The U.S. and international business communities have long expressed concerns about exchanges of confidential information between competition authorities.<sup>91</sup> Several issues have repeatedly surfaced, including agency accountability for safeguarding confidential material from unauthorized disclosure or use, notice to firms that such information is being provided to a foreign governmental authority, and transparency in the processes involved. These concerns were expressed by U.S. and international private bar associations and business groups in the course of Advisory Committee hearings and outreach efforts, and echo concerns raised at the time that passage of the IAEAA was under consideration. While concerns about the exchange and use of confidential information extend to all areas of antitrust enforcement, this chapter considers the topic as it applies to anticartel enforcement and civil nonmerger matters.<sup>92</sup>

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<sup>91</sup> There are a number of different types of information that may be described as "confidential," and these can be generally categorized according to the means by which such information is obtained, that is, by compulsory means or voluntary means. Material that a party is *compelled* to produce may be specifically protected under statute. For instance, in criminal matters disclosure of compelled information in matters occurring before a grand jury is only possible pursuant to a court order, pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure (West, 1999). In the civil nonmerger context, information compelled from a party by a civil investigative demand (CID) under the Antitrust Civil Process Act, 15 U.S.C. §1312 or analogously under the Federal Trade Commission Act, 15 U.S.C. §46 is confidential and its use and disclosure permitted in only narrow circumstances. And the Hart-Scott-Rodino Act, 15 U.S.C. §18a, accords protection from disclosure to merger-related materials produced thereunder. Material produced *voluntarily* to antitrust enforcers conducting an investigation, criminal or civil -- whether from parties under investigation or third parties -- and materials otherwise obtained by antitrust investigators are considered confidential investigatory materials and protected from disclosure in keeping with applicable laws and policies.

<sup>92</sup> In the following discussion, confidential information is intended to mean information produced under compulsory process and protected by statute, voluntarily produced and protected as agency investigatory material pursuant to applicable laws and policies, or otherwise categorized as confidential investigatory material obtained or created by agency staff in the course of an antitrust investigation. The discussion in this chapter does not address concerns arising or the definition of confidential information in the context of multijurisdictional mergers. Chapter 3 of this report contains an extensive assessment of such issues.



## **Agency Accountability in Safeguarding Information**

Concerns about the possibility of “leaks” by competition agencies to competitors or to other enforcement agencies persist, despite the absence of any cited evidence of leaks.<sup>93</sup> One of the most often cited worries is that confidential information transmitted from one jurisdiction to another in an enforcement action will be disclosed to competitors.<sup>94</sup> American firms tend to fear that competition authorities in other jurisdictions may intentionally disclose confidential information from U.S. firms to competitor companies, perhaps even companies that are state-owned in part or full, with resultant harmful effects. Foreign firms tend to believe that U.S. antitrust authorities are unable to protect confidential information from disclosure to private third parties, through either litigation and the related discovery process or requests under the Freedom of Information Act. They appear particularly concerned that their own information might be used against them in private U.S. legal actions, including antitrust actions seeking treble damages.

Senior Antitrust Division officials have stated that there have been no leaks of information received from non-U.S. firms and, moreover, that the same protections under law apply to information received from domestic and foreign sources. They assert also that investigations of hard core cartel activity rarely focus on business information of the sort produced in connection with premerger reviews, including materials on sensitive trade secrets or prospective business plans. Thus, business concerns about interagency cooperation in the sharing of confidential or protected information are far less germane in cartel enforcement matters than they are in multijurisdictional merger reviews.<sup>95</sup> Furthermore, concern about possible leaks appears to stem from fears about prospective interagency exchanges with jurisdictions that have limited experience with competition law and policy and less established safeguards in place, or between jurisdictions that have disparate access to confidential and business sensitive material in the course of enforcing their anticartel laws.<sup>96</sup>

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<sup>93</sup> Antitrust enforcers discussed the track record of their agencies with respect to leaks, and indicated that they have had no such occurrences. Panel on Current U.S. Bilateral Agreements, ICPAC Hearings (Nov. 2, 1998), Hearings Transcript at 106-160.

<sup>94</sup> *Cf.* Prepared Testimony of Stephen D. Bolerjack, Counsel, Antitrust and Trade Regulation, Ford Motor Company, on behalf of the National Association of Manufacturers, ICPAC Hearings (Apr. 22, 1999) (reiterating reservations expressed at the time the IAEAA was enacted over the sharing of data and other proprietary information furnished to U.S. antitrust enforcers that could be useful to another country’s domestic industry)

<sup>95</sup> See e.g., Spratling, *A Practical Approach*, at 5 (discussing reasons why the possibility for an OECD Recommendation on hard core cartels might be ripe for progress); *Accord*, Peter M.A.L. Plompen, *Panel Discussion: Japan & U.S. Competition Issues*, in 1998 FORDHAM CORP. L. INST. 83, 102 (B. Hawk ed. 1998).

<sup>96</sup> U.S. antitrust authorities consider requests for disclosure of confidential information on a cases-by-case basis. Certain considerations will be at the core of any agency determination to share information protected either under law or policy, regardless of the vehicle under which a request is made (MLAT, IAEAA agreement, or assistance request under traditional legal channels). Core considerations include, among other things, confidence in the requesting authority’s legal authority and practice to safeguard confidential treatment of such information and to make only authorized use

## **Transparency**

A policy of transparency in anticartel investigations is necessary to provide a measure of predictability about the potential use and disclosure of information produced by the targets of investigations should they decide to cooperate with investigators.<sup>97</sup> The experiences of antitrust enforcers in the United States and other jurisdictions with leniency policies indicate that transparency in the process employed when applying such policies is critical to obtaining necessary cooperation from cartel participants. Cooperation is an important component in the successful investigation and prosecution of international cartels because some important materials are often likely to be located outside the jurisdiction investigating an international cartel. Revisions to the U.S. Corporate Leniency Policy were prompted by such considerations and, accordingly, incorporated provisions for automatic amnesty, including the nondisclosure of identifying information about parties who qualify for amnesty. Today, U.S. antitrust officials repeatedly attribute much of their success in obtaining cooperation from targets of cartel investigations to the Antitrust Division's readiness to provide transparency throughout its anticartel enforcement program.<sup>98</sup>

It is in the interest of sound competition policy and its enforcement that all competition authorities apply a policy of transparency concerning standards applying in anticartel enforcement matters to ensure that they and members of the public are aware of applicable domestic laws and policies governing the management, use, and exchange of confidential information. This is important whether or not concerns about agency accountability are fully warranted by the record. Continuing efforts to increase transparency are necessary to instill greater business confidence that exchanges will not result in adverse commercial consequences.

## **Notice**

Another recurring concern from some members of the business community and the private bar is that competition authorities have refused to commit to provide notice, either before or after the fact, when interagency disclosure of confidential information takes place. European firms in

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or disclosure of the information for purposes set forth in their assistance request. It necessarily follows that a determination by U.S. antitrust authorities to share confidential information will reflect a degree of confidence in the requesting authority based upon a sufficient history of enforcement coordination and cooperation. Section 8 of the IAEAA, 15 U.S.C. § 6207, and all U.S. MLATs include provisions for such an assessment.

<sup>97</sup> A policy of transparency in anticartel investigations is intended to mean being clear about the standards that an antitrust authority applies. For the U.S. Department of Justice, examples of how a policy of transparency applies include the way in which the Antitrust Division considers and resolves issues, for instance, in applying the Corporate Leniency Policy and in negotiating plea agreements with cooperating defendants. *See* Spratling, *Transparency*.

<sup>98</sup> Former Deputy Assistant Attorney General Gary Spratling made transparency a theme in nearly all of his official speeches. *See, e.g.*, Spratling, *Transparency* and handout thereto (enclosing Division speeches on the workings of the criminal enforcement program, the Corporate and Individual Leniency Programs, and excerpts of relevant Federal Sentencing Guidelines, and Antitrust Division policies).



particular have expressed apprehension that they may not be notified before information produced voluntarily to EU competition authorities -- for the purpose of informal discussion, say, or to obtain exemption or clearance for commercial agreements that are not in violation of EU law -- is transferred to U.S. antitrust authorities.<sup>99</sup> Consequently, some European firms advocate a system providing notice before such material is transmitted to another jurisdiction, so that they may object or request that safeguards for its protection be secured before the transfer.<sup>100</sup>

The Advisory Committee recognizes that enforcement authorities may not be in a position to provide notice when doing so would violate applicable treaty terms or a court order or jeopardize an ongoing criminal investigation. Despite these constraints, U.S. antitrust enforcers have stated they are willing to provide notice after the fact in appropriate circumstances.<sup>101</sup> Moreover, there are other circumstances when constructive notice will be provided: for instance if a U.S. antitrust authority seeks information from a U.S. firm for use in responding to a request for assistance from a sister antitrust authority. Further, in situations where information is voluntarily provided to U.S. antitrust enforcers, the producing party can include terms for notice or restrictions on use or disclosure of its information.

The Advisory Committee recommends that U.S. antitrust authorities consider providing *notice* -- either before or after the fact -- of their intent to disclose information to antitrust authorities in other jurisdictions unless such notice would violate a treaty obligation of the United States, or a

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<sup>99</sup> Of course this will be affected in the future by proposed EC reforms to the notification process under Article 81(3) of the EC Treaty (formerly designated as Art. 85(3)). White Paper on the Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, Commission Programme 99/027. A separate but related issue for both U.S. and European firms extends to materials that are protected as privileged within their respective jurisdictions: particularly material protected by attorney-client privilege. European firms argue that because the EC and the United States hold different views on whether this privilege extends to corporate communications with in-house legal counsel, it is possible that such information will be conveyed to U.S. antitrust enforcement authorities through international agency cooperation, thereby potentially placing European firms at a disadvantage to their U.S. competitors in any U.S. antitrust investigation.

<sup>100</sup> See e.g., EU Committee of the American Chamber of Commerce in Belgium, "EU Committee position paper on international cooperation between Anti-Trust Authorities" (May 13, 1996) at 2-3; see generally, Union of Industrial and Employers Confederations of Europe, "UNICE Preliminary Comments: US/European Union Draft Antitrust Cooperation Agreement," (29 November 1994) at 1-2.

<sup>101</sup> See Antitrust Division Manual at III:46-47 (1998); Spratling, *Negotiating the Waters* at 12-13 *United States v. Showa Denko Carbon Inc.*, Crim. No. 98-85 (E.D. Pa. 1998) (graphite electrodes) (an example of a plea agreement provision affording after-the-fact notice for disclosure to foreign enforcement authorities); See also Antitrust Civil Procedure Act § 3, 15 U.S.C. § 1312 (providing a right to object to a Civil Investigative Demand (CID) that orders production of information that came into the CID-recipient's possession through discovery from another person in order to prevent or condition production of otherwise protected or privileged information. Also provides a minimum time to object. This right extends to both (1) the person receiving the CID and (2) the relevant third party).

court order, or jeopardize the integrity of any U.S., state or foreign investigation.<sup>102</sup> The U.S. antitrust agencies must, of course, assess requests to share confidential information by taking into consideration, among other things, their history of enforcement cooperation with the requesting jurisdiction as well as whether they are confident that the jurisdiction is able to and does protect confidential information under its own laws.

## **Transparency and Notice Issues in Civil Nonmerger Matters**

Concerns about transparency in the use and management of confidential business information and about notice cut across all areas of U.S. antitrust enforcement. Chapter 2 discusses these issues as they apply in multijurisdictional merger reviews. The subject is considered briefly here as it arises in civil nonmerger matters. In the civil nonmerger context, an approach that may sometimes be useful to antitrust authorities from different jurisdictions who are conducting investigations of similar facts is to ask a party under investigation to sign voluntary written waivers allowing the agencies to share information. This approach can benefit the subject of an investigation as well as the cooperating antitrust agencies. It provides the waiving party with an understanding of the information-sharing process, control over the type of information that the investigating agencies may exchange, and notice of both their general intent to do so and to collaborate broadly in their respective investigations. For antitrust authorities, use of waivers can enable them to proceed jointly in pursuing their investigations and in fashioning remedies.<sup>103</sup> The recent U.S. record, including the *Microsoft I* and *A.C. Nielsen* cases, supports this policy.<sup>104</sup>

At the same time the Advisory Committee recognizes that incentives to provide waivers for subjects of nonmerger investigations will differ somewhat from those for parties to a merger (who are focused on “getting the deal done”), so there may be fewer opportunities for waivers to be used to enhance interagency cooperation in civil nonmerger matters. Nonetheless, subjects of civil nonmerger investigations are more likely to provide waivers in those instances when they understand the information-sharing process and can determine that they will benefit from interagency cooperation pursuant to waivers. The Advisory Committee believes that both transparency and

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<sup>102</sup> Business groups advocate such disclosure, and the Antitrust Division has issued a consistent policy position in criminal matters with respect to after the fact notice, assessed on a case by case basis. Specifically, the Antitrust Division has explained that in negotiating plea agreements with cooperating targets of investigations, although it will *not* agree either to provide notice before disclosing information to foreign law enforcement authorities that was obtained from cooperating defendants or to blanket commitments to provide notice to cooperating defendants either before or after disclosing information to foreign sovereigns, it *may* agree to provide notice after disclosing information, unless such notice would violate a treaty obligation of the United States, or a court order, or may jeopardize the integrity of any U.S., state or foreign investigation. Spratling, *Negotiating the Waters*, at 12-13.

<sup>103</sup> Annex 2-D contains several model waivers of confidentiality protections proposed for use in multijurisdictional merger reviews. These may prove models for use in civil nonmerger matters as well.

<sup>104</sup> Both of these cases involved U.S. and EU simultaneous review of allegedly anticompetitive activities; they are discussed more fully in Annex 1-C and Chapter 5 of this report.



accountability can be enhanced through such use of waivers in the civil nonmerger context, without adding unnecessary burden on the reviewing competition agencies.

### **Other Confidentiality Proposals Considered**

Some experts have suggested imposing limitations on the use of confidential information. Specifically, it has been proposed that the Antitrust Division should commit not to make information obtained for one purpose available for use in other matters, such as using information received in a civil nonmerger investigation in an unrelated criminal investigation. After considering this proposition, the Advisory Committee concluded that it may be attractive to foreign firms and authorities, but would not clearly enhance interagency cooperation enough to warrant the potentially significant policy constraints the proposal would place on U.S. enforcement agencies.

The Advisory Committee has also considered a number of specific proposals aimed at improving cooperation with foreign authorities through certain adjustments in U.S. legal procedures or fines, including treble damages in private antitrust litigation. The Advisory Committee considers elements such as treble damages, right of private (including class-action) suits, and broad rights of discovery to be among the strongest features of the U.S. enforcement system, even though they are often particularly unpopular abroad. Accordingly, the Advisory Committee concludes that, notwithstanding the potential benefits from increased cooperation from foreign authorities and firms, modifications of these core features of the U.S. system are not recommended. The Advisory Committee believes that sanctions directed at hard core cartel conduct should not be weakened.

### **THE IMPORTANCE OF POSITIVE INCENTIVES**

The Advisory Committee has discussed the importance of providing specific positive incentives to extend and deepen cooperation between U.S. and foreign competition authorities. Positive incentives should aim to further develop a shared culture of sound competition policy around the world, instill greater public confidence in the value of interagency enforcement cooperation, and reduce tensions associated with U.S. enforcement. To this end, the Advisory Committee recommends that the U.S. government expand its ability to provide technical assistance designed to enhance international cooperation and promote sound competition policy regimes. While the Antitrust Division and Federal Trade Commission have built a record of technical assistance during the 1990s,<sup>105</sup> the Advisory Committee recommends that this work be expanded with support from more and consistent funding, and that its focus be enlarged. For instance, funds could be allocated in at least two directions. One would focus on traditional core functional areas, such as anticartel enforcement activities and premerger reviews; the other could be designed to fund new initiatives, including those considered in Chapters 5 and 6 herein. As part of the first emphasis, the United States should enhance its coordinated technical assistance efforts with programs

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<sup>105</sup> See Annex 6-A for details on these technical assistance programs and their funding.

organized by international organizations, such as the OECD, which provides a model for deepening programming through its use of seminars and the case study method.

The second category might extend to funding support to advance basic concerns, such as the operating needs and capabilities of authorities that are beginning to introduce or to enhance competition law and policy regimes. At a time of tight budgets and many worthwhile programs, funding is always an issue. One idea that the Advisory Committee has considered would allocate a small percentage of funds obtained through antitrust fines in cartel prosecutions to further these institution building objectives.<sup>106</sup> There are precedents under U.S. law for making such allocations,<sup>107</sup> including examples of alternative sentences of this nature being imposed on defendants in domestic cartel litigations.<sup>108</sup>

The Advisory Committee has also considered the positive role that bilateral antitrust enforcement agreements can play in fostering cooperation with antitrust authorities in other jurisdictions.<sup>109</sup> Such agreements create opportunities for the United States to encourage new competition agencies in their development. The 1999 agreement between the U.S. and Israel is a

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<sup>106</sup> This use -- which can be seen as ultimately benefitting victims of anticompetitive conduct -- is also in the spirit of the current practice, under which all fines obtained in criminal antitrust cases are deposited with the Department of Justice Office of Victims of Crime.

<sup>107</sup> The doctrine of *cy pres*, or fluid recovery, is applied in civil cases -- typically in antitrust and consumer class actions -- to redirect unclaimed funds to their next best use, and with the intention of benefitting persons who are *not* identical to the aggrieved class of plaintiffs. See *Superior Beverage Co. v. Owens-Ill.*, 827 F.Supp. 477 (D.C.N.D. Ill. 1993) (where unclaimed funds remained after settlement, court applied doctrine of *cy pres* and court's own equitable powers to use funds for public interest purposes as "seed money" that was ultimately used to establish the Institute of Consumer Antitrust Studies at Loyola U. Law School); *see also*, *In re Corrugated Container Antitrust Litigation*, MDL 310, 53 ANTITRUST & TRADE REG. REP. 711 (S.D. Tex. 1987) (awarding funds remaining in settlement for division among six law schools, National Association of Attorneys General, and two packaging industry foundations).

<sup>108</sup> See e.g., *United States v. Mrs. Baird's Bakeries* (D.C. N.D. Tex. Crim No.: 3-95CR-294-R) (D.C. N.D. TEX. 1996) (domestic cartel prosecution for price fixing of bread and bread products. After conviction by jury trial, court sentenced corporate defendant to a \$10,000,000 fine and 5 years probation with a condition of "release" that it perform 2500 hours of community service); *see also* *United States v. McDowell Contractors, Inc.*, 668 F.2d 256 (6<sup>th</sup> Cir. 1982) (domestic defendant in bid-rigging scheme sentenced after plea agreement accepted, court imposed and suspended a fine on condition that defendant repair bridges). *But see* *U.S. v. Missouri Valley Construction Co.*, 741 F.2d 1542 (8<sup>th</sup> Cir. 1984) (holding that a federal district court may not impose on a willing corporation as a condition of probation, in lieu of a fine, the requirement that it contribute money to a charitable organization that has not suffered actual damages or loss from corporation's criminal offense. Corporation convicted of bid-rigging in the road construction industry and had been ordered to endow a chair in ethics at the University of Nebraska Foundation in lieu of paying same sum as a fine).

<sup>109</sup> A detailed description of the bilateral antitrust agreements into which U.S. antitrust authorities have entered appears in Annex 1-C, hereto.



good case in point.<sup>110</sup> The U.S.-Brazil agreement is another recent example.<sup>111</sup> It was the first bilateral antitrust agreement to include provisions for technical cooperation and the second agreement, after the U.S.-Israel agreement, signed with a young antitrust authority. Technical assistance programs enable U.S. antitrust authorities to develop interagency relationships through which sister antitrust authorities can develop familiarity with the U.S. antitrust laws and enforcement system. While this process is time consuming and necessitates drawing upon the resources of U.S. antitrust agencies as they provide assistance to the developing antitrust agencies, it appears to act over time as a positive incentive to establishing necessary building blocks to deepen cooperation.<sup>112</sup> The Advisory Committee supports efforts of the U.S. Antitrust Division to expand the number of jurisdictions with which it has entered into bilateral cooperation agreements in order to include newer systems as well as jurisdictions with developed antitrust laws and policies. The Committee recommends that the Division continue to pursue the negotiation and implementation of modern antitrust agreements, including those that feature more detailed provisions regarding positive comity.

#### SUMMARY OF RECOMMENDATIONS

##### Improving Knowledge about International Cartels

Whether the surge in U.S. prosecutions means that there are more international cartels in operation than ever before is unclear. What is clear is that international cartels present a serious problem with adverse effects on U.S. and foreign consumers, businesses, and governments. With U.S. anticartel enforcement actions generating considerable interest around the world, the time is opportune for U.S. antitrust agencies not only to expand cooperation with antitrust authorities in other jurisdictions, but also to increase public awareness about the detrimental effects of international cartels. The Advisory Committee recommends:

1. A complete assessment of the incidence of private international cartels is beyond the capabilities of the Advisory Committee. Nonetheless, the Advisory Committee believes that the scope and incidence of international cartels are important matters for further examination and recommends that governments and other experts take up this issue;

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<sup>110</sup> Agreement Between the Government of the United States of America and the Government of the State of Israel Regarding the Application of Their Competition Laws, March 15, 1999, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶13,506.

<sup>111</sup> Agreement Between the Government of the United States of America and the Government of the Federative Republic of Brazil Regarding Cooperation Between Their Competition Authorities In the Enforcement of Their Competition Laws, October 26, 1999.

<sup>112</sup> This is true even though, as described in detail in Annex 1-C hereto, bilateral agreements that are not negotiated under the IAEAA still remain limited instruments in many respects, because they do not alter existing law or otherwise expand the powers of antitrust authorities.

2. The Advisory Committee also recommends that the United States expand its efforts to increase public knowledge and awareness at home and abroad of the deleterious effects of cartels for consumers, businesses, and governments; and
3. To take advantage of the improved environment for international cooperation on rooting out and prosecuting international cartels, the Advisory Committee hopes that the United States will use all opportunities, both formal and informal, to share its recent experiences with foreign enforcement authorities. Actions to ensure that U.S. anticartel enforcement policies are well understood abroad will enhance the credibility of U.S. enforcement efforts and promote interagency cooperation at the same time.

### **Increasing Transparency in Handling Confidential Business Information**

The exchange of confidential information between competition authorities is an important feature of deepening cooperation. The U.S. and international business communities have expressed concerns about agency accountability and transparency in connection with such information exchanges, particularly with respect to cross-border joint investigations into cartel activities (similar concerns in the context of multijurisdictional merger reviews have also been pressed and are addressed in Chapter 3). Another recurring concern of some members of the business community and the private bar is that competition authorities do not provide *notice* when they transfer confidential information or other protected information in their agency files to another enforcement agency. In the view of the Advisory Committee:

1. Cooperation between competition authorities should feature appropriate safeguards for confidential information. Competition authorities should ensure the transparency of standards applied in their enforcement efforts. Continuing efforts are necessary to instill greater business confidence that exchanges will not result in adverse commercial consequences;
2. U.S. antitrust authorities should consider providing notice -- either before or after the fact -- of their intent to disclose information to antitrust authorities in other jurisdictions unless such notice would violate a treaty obligation of the United States or a court order or jeopardize the integrity of any U.S., state, or foreign investigation; and
3. The U.S. agencies should assess requests to share confidential information by taking into consideration, among other things, their history of enforcement cooperation with the requesting jurisdiction as well as their confidence that the jurisdiction is able to and does protect confidential information under its own laws.



### **The Importance of Positive Incentives**

The United States should attempt to identify positive incentives that can deepen cooperation between the U.S. antitrust authorities and competition authorities in other jurisdictions, instill greater public confidence in the value of such cooperation, reduce tensions associated with U.S. enforcement, and further develop a shared culture of sound competition policy around the world. To this end, the Advisory Committee recommends that:

1. The U.S. government should expand its ability to provide technical assistance, both bilaterally and in coordination with international organizations, to develop traditional core functional areas such as anticartel enforcement activities and premerger reviews, as well as new initiatives (such as those discussed in Chapters 5 and 6) to support the operating needs and capabilities of authorities that are beginning to introduce or to enhance competition law and policy regimes; and
2. U.S. antitrust authorities are encouraged to expand the jurisdictions with which they have modern antitrust cooperation agreements, including those that feature more detailed provisions regarding positive comity. The U.S. authorities should seek cooperative arrangements with qualified jurisdictions that have newer competition systems as well as with those with more established competition laws.

## Chapter 5

### WHERE TRADE AND COMPETITION INTERSECT

In this chapter, the Advisory Committee considers the intersection of trade and competition policy. Notably, the Advisory Committee focuses on anticompetitive or exclusionary restraints on trade and investment that are implemented by firms, governments, or some combination of the two, and that hamper the ability of firms to gain access to or compete in foreign markets. Traditionally, such problems have been considered primarily the responsibility of national competition authorities concerned about anticompetitive effects to markets and consumers on their soil. Some countries, notably the United States, have at times applied their law extraterritorially in an attempt to remedy such practices. As formal governmental barriers to international trade and investment are reduced or eliminated, international attention is turning more to anticompetitive practices occurring *within* nations that affect trade and investment flows *from* nations. As a result, perceived restrictions emanating from exclusionary or anticompetitive practices have generated economic and political tensions between nations and firms.

This chapter reviews the landscape of global problems that implicate both international trade concerns about access to markets and competition policy concerns about anticompetitive practices that inhibit the operation of markets. Not all international competition problems are relevant to trade problems, however. As discussed in Chapters 2 and 3, the proliferation of merger control regimes is raising transaction costs and introducing new frictions. As discussed in Chapter 4, international cartels appear to be a serious problem for the United States and the global economy. These matters are global competition problems but they are not trade and competition policy issues. There is an important global competition agenda that needs greater attention by policymakers at home and abroad and also requires some new policy initiatives (see Chapter 6).

This chapter considers a variety of acts of governments and firms that can restrict both international trade and international competition. Anticompetitive private arrangements can also have adverse effects on international trade and access to markets, while formal governmental actions around the world immunize some firm conduct that is excessively trade-restricting and anticompetitive. Governments may also take measures that are excessively trade restricting and anticompetitive, and in some instances private arrangements occur against a backdrop of supportive governmental restraints. The latter are neither purely private restraints nor purely governmental practices, but a mix of both.



Trade and competition policies are designed to address these economic distortions from different sources. Trade policy is centrally focused on the actions of governments. Competition or antitrust laws are principally focused on firm conduct.<sup>1</sup> As this chapter discusses, aspects of these tools can be mutually supportive. At the same time, overlapping policy concerns lead to different conclusions regarding the effects of a particular restraint. For example, U.S. antitrust law might find a vertical distribution practice efficiency-enhancing and beneficial to consumers, while a trade policy perspective might find the same practice exclusionary and adversely affecting access to markets.

Neither trade nor antitrust policy tools provide complete solutions to the problems that emanate from this mix of governmental and private restraints. Extraterritorial enforcement of national antitrust laws appears to have had little effect in removing restraints and opening access to markets. Rules promulgated by the World Trade Organization (WTO) are currently unavailable for private restraints, and U.S. trade rules, such as Section 301 of the 1974 Trade Act, as amended, offer only limited application to governmental practices that tolerate anticompetitive private restraints.<sup>2</sup> At present, no international set of rules directly addresses business practices, although some observers are of the view that such disciplines should be developed at the international level.

Through its outreach efforts and public hearings, the Advisory Committee solicited input from various enforcement officials, business groups, economists, organized labor, and other interested parties as to potential policy options for addressing foreign-based harms. The Advisory Committee is of the view that seeking full-scale convergence of antitrust laws is neither feasible nor

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<sup>1</sup> Experts have long noted that these two policy areas have different sources of domestic political support and differing substantive standards. For much of the postwar period, the goals of trade policy have been to remove discriminatory distortions by governments that inhibit access to markets for exporters. Competition rules, in contrast, are nationally determined and are centrally focused on protecting the operation of the market. See Robert E. Hudec, *A WTO Perspective on Private Anti-Competitive Behavior in World Markets*, 34 NEW ENG. L. REV. 79 (1999). This essay contains a thorough and nuanced discussion of differences between trade and competition policy perspectives of relevance to possible treatment of competition policy under the WTO.

<sup>2</sup> In 1988, domestic U.S. trade law took a step in the direction of antitrust laws when it clarified that “unreasonable” practices under Section 301 of the 1974 Trade Act, as amended, can also apply to those governmental actions that constitute systematic toleration of anticompetitive activities by foreign firms that restrict market access. Harvey M. Applebaum, *The Interface of Trade Laws and the Antitrust Laws*, 6 GEO. MASON L. REV. 479, 483 (1998) citing 29 U.S.C. §2411(d)(3)(B)(I)(IV). Foreign government toleration of anticompetitive practices was defined as an “unreasonable” practice under Section 301. In the 1994 amendments to Section 301 following the Uruguay Round, Congress clarified the definition of anticompetitive practices. A government may be found to be acting unreasonably if it: (1) tolerates systematic anticompetitive activities by state-owned enterprises as well as private firms; (2) denies market access for U.S. services as well as goods; and (3) restricts the sales of U.S. goods or services to a foreign market. See Message from the President of the United States Transmitting the Uruguay Round Trade Agreements, Statement of Administrative Action and Required Supporting Statements, H.R. Doc. No. 103-316, 103d Cong., 2d Sess., at 1018 (1994) cited in C. O’Neal Taylor, *The Limits of Economic Power: Section 301 and the World Trade Organization Dispute Settlement System*, 30 VAND. J. TRANSNAT’L L. 209, 216-17 (1997). The legislative history of this revision shows that foreign law is the basis for the determination of whether anticompetitive practices have been tolerated. Applebaum at 486.

desirable at this time. Hence, it considered the utility of positive comity, extraterritorial enforcement, and multilateral initiatives.

The Advisory Committee believes that no single one of these approaches is capable of addressing all aspects of competition problems facing the United States and the global economy. Several different approaches may be promising. Bilateral agreements with positive comity offer a potentially useful instrument for addressing private restraints. The potential or actual use of extraterritorial enforcement of U.S. antitrust laws may be necessary and effective in some circumstances. And further development of international competition policy initiatives is, in the Advisory Committee's view, important for the global economy.

This chapter considers and evaluates the utility of both old and new approaches to such problems. It starts by defining the scope of trade and competition problems, reviews cases that have animated international attention, and considers alternative policy approaches, including bilateral cooperative solutions, extraterritorial enforcement responses, and expanded international initiatives, at the WTO and elsewhere.

#### **THE ADVISORY COMMITTEE'S DEFINITION OF RELEVANT PRACTICES**

In thinking about the interface of trade and competition issues, the Advisory Committee believes that U.S. policy needs to take a broader focus than purely private business practices alone. Indeed, governmental practices as well as practices undertaken by firms with the blessing, encouragement or toleration of governments can also have anticompetitive and exclusionary effects. This section provides a non-exhaustive description of a range of practices that the Advisory Committee believes policymakers should consider as relevant practices.

As noted in Chapter 1, there are also a variety of practices that may be reprehensible, illegal, or offensive under U.S. or foreign law that can fundamentally impact the nature of competition within a domestic or international market but that are not part of the discussion herein. Substandard wage and employment standards, utilization of child labor, or lax environmental regulations are a few such examples. The decision by groups of purchasers to boycott products that are exported under those conditions may also affect trade; however, these matters are all beyond the scope of this examination.<sup>3</sup>

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<sup>3</sup> A representative of the AFL-CIO recommended that the Advisory Committee consider the potential distortions to international competition when jurisdictions with diminished labor standards are in fact providing an unfair subsidy to their economies. *See* Remarks by Thea Lee, Assistant Director of Public Policy, AFL-CIO, ICPAC Full Committee Meeting (July 14, 1999), Meeting Minutes at 14-15 [hereinafter Lee July 14, 1999 ICPAC Meeting Remarks]. Traditionally, this has not been considered an international antitrust issue and it is unclear to what extent deficient labor standards have an adverse impact on foreign firms' market access. The consideration of unfair subsidies is outside the scope of the Advisory Committee's consideration of trade and competition policy issues.



## **Private Anticompetitive or Exclusionary Restraints**

Broadly speaking, most countries that have established competition policies have identified a range of permissible and impermissible horizontal and vertical restraints and exercises of market power by firms in a dominant position. Many of the private business practices that are proscribed under U.S. or foreign competition laws can, if left alone, not only harm the domestic economy and domestic consumers but also harm foreign firms seeking to expand or gain access to those markets (see Box 5-1 for hypothetical example of a private anticompetitive restraint). This could in theory be the case for horizontal, vertical, or monopolistic practices. For example, if a group of domestic firms with market power agree to boycott foreign products the consequence of that horizontal cartel agreement can be to inhibit foreign firms from gaining access to the market. But as the Report demonstrated in Chapter 4, business collusion is not just a domestic concern. Such cartels could, in theory, be comprised only of domestic firms or could be formed among some combination of domestic and international firms. The arrangements could result in market allocation agreements with respect to a single or multiple markets.

Similarly, under some facts, vertical distribution practices can also prevent a foreign entrant (as well as a domestic firm) from developing the distribution networks necessary to penetrate a market. For example, a domestic manufacturer(s) with market power could threaten to cut off sources of domestic supply to domestic distributors unless the latter agree not to handle competing imported product. As discussed in Chapter 2, mergers may have anticompetitive spillover effects in other jurisdictions than the regulating nation where the transaction is occurring. One can imagine a set of facts whereby the development of national champion firms through domestic mergers can harm world markets and foreclose access to a market for would-be foreign entrants. Alternatively, nations have raised concerns over mergers that impact foreign markets and sought to ensure that a foreign firm's acquisition of interests in a domestic firm does not exclude their other domestic firms from entering the foreign market.<sup>4</sup> Since the host government is approving the merger, the actions of the government are also implicated in these practices.<sup>5</sup>

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<sup>4</sup> See e.g., *United States v. MCI Communications Corp.*, 1994-2 Trade Cas (CCH) ¶70,730 (D.D.C. 1994) (British Telecom sought to acquire minority interest in a U.S. carrier, MCI. U.S. obtained a consent decree requiring compulsory access to the British national network for other U.S. international carriers); *United States v. Sprint Corp.*, 1996-1 Trade Cas (CCH) ¶ 71,300 (D.D.C. 1995) (As a condition of allowing the government-owned French and German telephone monopolies to acquire minority shareholdings in the third largest U.S. international carrier, Sprint, the consent decree negotiated by the U.S. Department of Justice prohibits the proposed joint venture from providing certain services until other U.S. international carriers had the opportunity to provide similar services in France and Germany). For a further discussion of these cases, see Donald I. Baker and W. Todd Miller, *Antitrust Enforcement and Non-Enforcement as a Barrier to Imports*, INT'L BUS. LAW., 488, 490 (Nov. 1996).

<sup>5</sup> Private restraints can also take the form of abuse of intellectual property rights, including technology licensing arrangements that exclude licensees from a market after the life of the intellectual property right has expired can also block a firm from entering a foreign market.

Private anticompetitive practices often occur with the blessing or encouragement of the national government. A state may limit or close off many avenues by which a newcomer might naturally penetrate a market (a government, for example, might limit foreign direct investment or licensing). In such an environment, exclusive dealing contracts and other exclusionary practices that would otherwise be innocuous can effectively close the market. In those cases, where the government action is supportive of the private action, the lines of accountability are blurred. Because such exclusionary practices are neither purely anticompetitive private restraints nor purely governmental practices, they are sometimes called “hybrid practices.”<sup>6</sup>

Anticompetitive restraints that can act as barriers to a market may stem from a set of circumstances that could not have occurred “but for” some antecedent action by a government that may or may not rise to the level of ongoing governmental supervision or regulation. For example, if a government were to delegate authority over whether or not to grant licenses or permits to an industry association that then used that power to exclude all foreign firms from entering into the market or to keep foreign presence to a minimum, these actions, taken together, might constitute a “hybrid” practice.

Similarly, as new technologies are developed in high-tech areas such as telecommunications and information technology, the adoption of an industry standard can offer powerful benefits to the manufacturer of that standard. In a global market, the activities of standard-setting bodies can also have an increasing impact on international trade, as firms and consumers will seek to use technological standards that can work easily abroad. A standard that is not compatible with other technologies can “tip” the development of the technology toward the selected standard and eliminate the ability of other firms, particularly foreign firms unrepresented in the standard-setting organization, to compete in the market.

Private restraints may also be encouraged by governmental regulators or even by the lack of enforcement by domestic competition agencies. Governmental policy makers may even be more proactive and encourage firms to allocate market share or develop interlocking distribution networks in the belief that such actions will stabilize or benefit a domestic industry in the early stages of its development. Moreover, a lack of enforcement by competition agencies may also give tacit encouragement to private firms that their anticompetitive conduct is permissible. Although these are hypothetical examples, they have all surfaced in some variant in international economic policy debates. Under many of these potential fact patterns, an important question is whether and to what extent the resulting competition problems are attributable to a government versus the private or

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<sup>6</sup> See e.g., AMERICAN BAR ASSOCIATION SECTIONS OF ANTITRUST LAW AND INTERNATIONAL LAW AND PRACTICE, REPORT ON PRIVATE ANTICOMPETITIVE PRACTICES AS MARKET ACCESS BARRIERS 15 (January 2000) [hereinafter ABA REPORT ON PRIVATE ANTICOMPETITIVE PRACTICES].



quasi-private commercial entities that are engaging in the exclusionary or anticompetitive practices.<sup>7</sup>

## **Governmental Practices**

Governmental practices can of course also be trade restraining.<sup>8</sup> The governmental impact can be felt through formal antitrust exemptions or parochial state action designed to promote national champions at the expense of foreign competitors. These examples can imply the lack of law, exceptions to law, or a lack of enforcement. Other regulatory practices such as the strategic application of competition policy (at the expense of foreign firms and on behalf of domestic players) can also affect on market access. Governmental practices may be overt, or they may be subtle. Governments could be held accountable to some degree for acts of omission, such as the failure to enforce competition laws, and the toleration of private anticompetitive conduct, such as import cartels, as a *de facto* or *de jure* substitute for traditional protection from imports. These points are amplified by identifying three different types of competition policy problems arising from government actions.

The availability of governmental exemptions and exclusions from competition laws has received extensive attention by policymakers and scholars.<sup>9</sup> This Advisory Committee has given it some consideration because the effects of such practices can be felt outside the regulating economy as well as by would-be foreign (and domestic) participants in a market. While significant deregulation has occurred in many OECD countries, many nations have not unilaterally reviewed and constrained the scope of their applicable exemptions and exclusions to competition policy. Further, some exemptions may not be viewed as in an individual country's interest to repeal in that they promote exports or have anticompetitive consequences, if any, only in offshore markets. Individual countries may be reluctant to eliminate or reduce the scope of exemptions if its trading partners continue to permit comparable arrangements to thrive.

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<sup>7</sup> Current trade policy tools have not yet been tested with respect to hybrid restraints. For example, the Technical Barriers to Trade (TBT) agreement at the WTO prohibits the use of standard setting for the purpose of impeding a market entrant. As yet, however, there has not been a WTO dispute settlement panel decision under the TBT concerning this problem.

<sup>8</sup> See *e.g.*, Merck & Co., Inc., "Competition Policy and the Pharmaceutical Sector," submitted for inclusion in the Advisory Committee record (May 25, 1999).

<sup>9</sup> One particularly thoughtful article explores the problem that state-authorized spillovers advantage states by undermining efficiency. See Robert P. Inman and Daniel L. Rubinfeld, *Making Sense of the Antitrust State Action Doctrine: Balancing Political Participation and Economic Efficiency in Regulatory Federalism*, 75 TEX. L. REV. 1203 (1997). Inman and Rubinfeld would deny exemptions for state regulations with significant spillovers unless supported by a negotiated interstate agreement. Meanwhile, to restore the federalist balance, they would make congressional decisionmaking subject to the publication of a Federalist Impact Statement (FIST), which would, among other things, protect participatory local and state policies.

A significant amount of economic activity around the world is insulated from challenge by competition laws. One important study commissioned by the OECD (hereinafter referred to as the 1996 Hawk Report) found substantial exclusions from competition 10 OECD countries including in employment-related activities, agriculture, energy and utilities, postal services, transport, communications, defense, financial services, and media and publishing, among other sectors.<sup>10</sup> Additional empirical work is needed to better understand the amount of economic activity affected by such arrangements around the world.

Various groups have considered the costs and benefits of exemptions. The 1978-79 National Commission for the Review of Antitrust Laws and Procedures undertook an extensive consideration of antitrust immunities and economic regulation. Their report called for a broad reexamination of antitrust immunities, affecting many sectors of the U.S. economy.<sup>11</sup>

The reluctance of governments to abandon their existing exemptions and exclusions is reflected in the recent 1998 OECD Recommendation on Hardcore Cartels. That Recommendation represented an important statement among OECD countries regarding their desire to cooperate with enforcement actions against hardcore cartels. This constructive undertaking notwithstanding, the Recommendation did not attempt to impose any disciplines on national exemptions and instead acknowledges a large carve out for arrangements that “are excluded directly or indirectly from the coverage of a Member country’s own laws; or are authorized in accordance with such laws.”<sup>12</sup>

A second problem arises from private action unleashed by government approval. The U.S. federal analogy is the state action defense in *Parker v. Brown*<sup>13</sup> and its progeny.<sup>14</sup> In the United

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<sup>10</sup> The specific circumstances under which the sector is subject to a relaxation of competition laws, differs of course by country and sector. See OECD, ANTITRUST AND MARKET ACCESS: THE SCOPE AND COVERAGE OF COMPETITION LAWS AND IMPLICATIONS FOR TRADE (Paris, 1996).

<sup>11</sup> The report recommended that an inquiry be conducted for each proposed exemption which would start with a strong presumption against exemptions from the rule of competition. It would proceed with a factual, contextual inquiry with the burden on the proponent of the exemption to demonstrate empirically clear and substantial defects in the market that make the exemption necessary. If an exemption is considered necessary, it should be tailored to meet the regulatory goals by the least anticompetitive means possible. See REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL OF THE NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES 185-187 (January 22, 1979).

<sup>12</sup> See 1998 OECD Recommendation on Hardcore Cartels, (I)(A)(2)(b).

<sup>13</sup> 317 U.S. 341 (1943).

<sup>14</sup> See e.g., *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). For an overview of the treatment of state regulation under the competition laws of the U.S. and EU, see Dirk Ehle, *State Regulation Under the U.S. Antitrust State Action Doctrine and Under E.C. Competition Law: A Comparative Analysis*, 6 E.C.L.R. 380 (1998). See generally, Eleanor M. Fox, *The Problem of State Action that Blesses Private Action that Harms “the Foreigners,”* in TOWARDS WTO COMPETITION RULES: KEY ISSUES AND COMMENTS ON THE WTO REPORT (1998) ON TRADE AND COMPETITION 325 (Roger Zäch, ed., 1999).



States, actions by one state that has adverse spillovers in other states can be corrected by the political process and the passage of federal preemptive law or other corrective measures. Internationally, however, the problem can be more intractable. A nation may undertake measures or immunities because it gains more from those measures than foreign parties. An additional problem with this type of state-blessed private action is that it is regarded as state action under competition law as a defense of the private action, but it is not typically regarded as state action in trade policy terms. Participants at Advisory Committee hearings offered several examples of negative crossborder spillovers from private conduct immunized by state action.<sup>15</sup>

A third type of problem is harm caused to outsiders by private action taken against a background business environment of public restraints. Some of the mixed private-public restraints discussed above can fit into this category. When most avenues for market entry are unavailable (for example, when acquisitions are not possible or distributors are unavailable), seemingly innocuous business practices (such as exclusive dealing contracts) may close the market to a new foreign market entrant. Whether this last set of problems is one that should be seen as properly the concern of competition policy or even trade policy remains controversial.

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<sup>15</sup> Two examples referenced at the hearings include: (1) the 1996 merger between Union Pacific and Southern Pacific Railroads, which was approved in the United States. While the Departments of Justice, Transportation, and Agriculture all urged that the merger not go forward, the Surface Transportation Board, which has final jurisdiction over railroad mergers, accepted the merging firms' assertions that the merger would produce efficiencies and approved the merger. Mexican competition authorities argued that the effects of the merger have been negative in Mexico, with limited remedial measures available to Mexico. Testimony of Fernando Sanchez Ugarte, President, Federal Competition Commission, Mexico, ICPAC Hearings (Nov. 2, 1998), Hearings Transcript at 90; and (2) the practices of standard setting bodies, such as the European Telecommunications Standards Institute (ETSI), whose procedures by design or consequence appear to benefit nationals at the expense of foreign market entrants. Submission by Peter Grindley, David J. Salant, and Leonard Waverman, Law and Economics Consulting Group, "Standards Wars: the Use of Standard Setting as a Means of Facilitating Third Generation Wireless Telecommunications Standard Setting," ICPAC Hearings, (May 17, 1999) [hereinafter Grindley, Salant and Waverman Spring Hearings Submission.] *See also* Submission by Leonard Waverman and David Salant, "The Use of Standard Setting as a Means of Facilitating Cartels and its Trade Effects," ICPAC Hearings (Nov. 4, 1999) [hereinafter Waverman and Salant November Hearings Submission].

### **Box 5-1: Hypothetical Example of Private Anticompetitive Restraint**

Imagine a concentrated product market abroad where three domestic manufacturers have held roughly stable shares for many years-- say 20, 25, and 50 percent. Imports of this product account for 5 percent of the market and most of the imported volume comes from the offshore plants of the three domestic manufacturers. Traditional barriers to entry include production experience, large investment requirements, and the local distribution system. The domestic manufacturers typically sell their product to intermediaries that sell and finance sales to end users. Virtually all of the wholesalers and other intermediaries deal exclusively with one of the domestic manufacturers or an affiliated wholesaler. Many of the largest end users also have close business ties to the major manufacturers and their affiliated wholesalers. Some domestic distributors and users have suggested that they are afraid of losing their most important domestic suppliers if distributors handle imported product. Market entry through acquisition is rare although not legally impossible. Distributors or dealers are required, either by contract or by practice, to notify domestic suppliers before handling competing imported products. Foreign firms are unable either to buy existing distributors or to convince distributors to handle their product, which they believe is competitive in both price and quality. The local producers control all of the available warehousing and storage facilities. In the past, this sector has been one of the targeted areas for national industrial policies, and government policies contributed to the current structure of the industry.

Is this a problem for trade policy or competition policy? The answer is not straightforward but it appears that both antitrust policy and trade policy tools would reasonably be considered:

#### ***Antitrust Policy Tools:***

- Facts as presented probably insufficient to determine whether conduct violates U.S. laws, although they suggest possibility of horizontal agreement to fix prices or allocate markets to protect status quo, as well as possibility of vertical restraints. Additional evidence would be required such as data showing effect on commerce is non-trivial, testimony from experts and participants, evidence of horizontal agreement. Potential violation of foreign antitrust law is also possible.
- What are the options for obtaining evidence?
  - voluntary production from parties or witnesses, which is unlikely
  - utilize bilateral agreement if available or request assistance from foreign government if unavailable.
  - refer the case under positive comity provisions or initiate the case in the foreign jurisdiction, or possibly initiate US court proceeding if evidence is sufficient.

#### ***Trade Policy Tools:***

- Facts suggest exclusionary practices in the foreign jurisdiction. While evidence of past government intervention is suggested, contemporaneous involvement is unclear. The industry might well be able to establish that it is experiencing market blockage requiring some US government attention -- at least hortatory or political pressure.
- Evidentiary standard for "unreasonable" practices under 301 are not uniform, only one 301 action alleging "toleration" has been attempted. Such a claim will need to show significant government nexus. Possibility of bilateral negotiation and agreement, although remedies are unclear.



## **Not All Competition Problems are Trade Problems**

Surely, not all restraints are anticompetitive and not all competition problems that are global in nature are by definition matters of relevance for international trade policy. Countries differ as to what is considered impermissible conduct as a matter of domestic competition laws. For example, U.S. law with respect to most vertical distribution practices considers the economic consequences of distribution restraints under a rule of reason analysis, a method of antitrust analysis in which the court is permitted to make a detailed inquiry concerning the effect on price and output of a certain practice in order to determine whether consumers have been harmed. The treatment of vertical restraints has been an area of controversy and a fluid area of the law.<sup>16</sup> The controversy surrounding vertical restrictions centers on whether or not antitrust should prohibit non-justified restraints that hinder rivals, or injure individual firms but cannot be shown to injure consumers or competition in a market as a whole. Business practices such as vertical distribution practices may have the effect of excluding other domestic firms or foreign firms from utilizing a distribution channel, but those practices may not be anticompetitive under U.S. or foreign law.

And, consideration of a vertical restraint from a trade perspective versus a competition policy perspective can lead to quite different conclusions regarding the effects of a restraint. If the restraint is examined under U.S. antitrust law, it will consider the effects on efficiency and consumer welfare. Viewed from the perspective of trade policy, on the other hand, the restraint may be seen as adversely impacting trade flows and access to markets if the foreign producer is being kept out of a market by virtue of the restraint, even if the restraint may arguably have efficiency-enhancing properties for the participants in the local market.

There are other competition problems that are not matters of concern for trade policy. For example, Chapters 2 and 3 considered the procedural and substantive features of multijurisdictional merger review that warrant additional efforts at convergence, harmonization and minimization. These issues, while important, are not matters customarily considered of consequence for trade policy, however. Similarly, expanding cooperation between competition authorities and developing protocols regarding the treatment of confidential information are important global challenges to competition policy but are not matters of relevance to trade policy.

Thus, there are areas where the distinction between trade versus competition policy concerns can be drawn quite sharply. There are other areas, however, where there are overlapping concerns but the policy tools have different points of application.

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<sup>16</sup> In the United States, for example, some vertical restraints have at times been prohibited but at other times been considered efficiency-enhancing and subject to a rule of reason analysis.

## THE SCOPE OF THE PROBLEM

To what extent do anticompetitive or exclusionary practices inhibit access to markets around the world? Is this a problem of sufficient magnitude to warrant attention from policymakers? To answer those questions the Advisory Committee set out to consider the evidence. The following summary of that record brings together examples of restraints that have caused economic tension between nations in recent years. Many of the incidents have been the subject of bilateral discussion between the conflicting parties; occasionally incidents have been taken up in multilateral forums such as the WTO or the Organization for Economic Cooperation and Development (OECD). In addition, this Advisory Committee has undertaken its own outreach effort, and the views advanced by trade associations, individuals, corporate executives and other experts are also summarized here.

The Advisory Committee did not attempt to determine whether the practices cited in the examples were in fact anticompetitive, commercially reasonable, or even accurately characterized. Its sole purpose was to illustrate the possible scope of the economic disputes stemming from this mix of governmental and private restraints. Indeed, some of the cases cited by foreign governments as representative of international trade and competition problems may not even be seen as competition problems under U.S. law. Measurements of the costs to the global economy of these alleged anticompetitive or exclusionary practices are not available now nor likely to be in the foreseeable future. Nonetheless, as discussed herein, the Advisory Committee believes that the problems are real and serious enough to warrant attention from policymakers.<sup>17</sup>

### Anecdotal Evidence

Some of the evidence presented to the Advisory Committee came from U.S. companies that believed their entry or expansion in a foreign market had been hindered by the anticompetitive or exclusionary business practices of their overseas competitors, sometimes with the support of the foreign government.

#### *U.S. Complaints about Japanese Business Practices*

Many of the most well-known disputes in recent years have occurred between the United States and Japan. The American firms typically brought their complaints to the attention of U.S. trade officials, and negotiations or consultations occurred between U.S. and Japanese trade and foreign policy officials. The U.S. team often included representatives from the Office of the U.S. Trade Representative (USTR), Antitrust Division in the Department of Justice, along with officials from the Departments of State, Treasury and Commerce. The evidence presented by the aggrieved

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<sup>17</sup> The Advisory Committee notes that the first suggested recommendation of the recent report by the American Bar Association's (ABA) Task Force on International Trade and Antitrust Concerning Private Anticompetitive Practices and Market Access Barriers is "[T]hat the United States should reaffirm the importance of the issue of private anticompetitive practices that prevent or inhibit access by U.S. and other competitors to other markets." ABA REPORT ON PRIVATE ANTICOMPETITIVE PRACTICES at 109.



U.S. firm or industry was often anecdotal or circumstantial in nature. For example, many U.S. companies pointed to their unsatisfactory export performance in the Japanese market compared with other foreign markets, their overall competitiveness in third-country markets, and instances of exclusionary or anticompetitive treatment by local Japanese firms.<sup>18</sup> Although the degree of industry concentration and other facts varied by sector, U.S. trade complaints have tended to center on vertical distribution practices seen as thwarting access to the Japanese market. And further, that some Japanese governmental practices, laws, and regulations have reinforced restrictive private arrangements.

**THE AUTO INDUSTRY:** The U.S. automotive industry argued that Japanese auto manufacturers had established exclusive distribution networks and had made it explicitly or implicitly known to their distributors that they would not welcome sales of foreign automobiles. The U.S. industry also complained that U.S. auto parts suppliers were foreclosed from Japanese repair shops through a combination of government certification requirements and pressure on authorized facilities from Japanese manufacturers. The Japanese government and industry denied all of these, and other, allegations.<sup>19</sup>

**THE FLAT GLASS MARKET:** In the highly concentrated Japanese flat glass market, the U.S. government (and industry) argued that the major Japanese manufacturers had tied up the distribution system and were using a variety of inducements and coercive methods to ensure that distributors did not handle imported products. One Advisory Committee hearing participant representing a U.S. flat glass manufacturer told the Advisory Committee that access to the Japanese market is controlled by an entrenched oligopoly of manufacturers that have effectively organized themselves into a cartel. According to this hearing participant, there has been no successful entry into the market by foreign competitors since the 1960s, and market shares for incumbent manufacturers have remained essentially constant over most of that period. Furthermore, this alleged cartel is said to control the Japanese market through a variety of collusive and exclusionary practices including refusals to deal, exclusive distribution arrangements, and economic coercion over domestic distributors and potential

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<sup>18</sup> One such qualitative allegation, advanced by the American Electronics Association submission to the Office of the U.S. Trade Representative in 1991, was as follows: "One U.S. company sought to sell an electronic component to three large Japanese industrial companies which accounted for more than 90 percent of purchases of that component in Japan. After seven years of effort, after technical approval by all three Japanese companies, after being recommended to top management as the superior (compared to Japanese competitors) component by the staffs of two of the three companies, and after having been told repeatedly by purchasing staff that its prices were 'fully competitive' or 'more than competitive' the U.S. company never made a single sale." See ABA REPORT ON PRIVATE ANTICOMPETITIVE PRACTICES at 11. See also discussion *infra*.

<sup>19</sup> For example, the Japanese industry argued that there were no such limitations and in fact that each manufacturer had (at the Japanese Government's urging) made it plain to distributors that they were free to handle imports.

purchasers of foreign glass. U.S. companies allege that an extensive network of industry trade associations ties distributors, retailers, and manufacturers to allow for collusive marketing efforts.<sup>20</sup>

In response, Japanese glass manufacturers and distributors have publicly stated that the market was open to all suppliers, foreign and domestic alike.<sup>21</sup> Japan's Fair Trade Commission (JFTC) has undertaken several surveys in this sector. Those surveys, which are answered on a voluntary basis and therefore are not akin to a formal investigation and have resulted only in limited recognition that some industry practices restrained trade. Absent a formal investigation, the results of the surveys cannot be considered conclusive.<sup>22</sup>

THE PAPER INDUSTRY: A representative from the U.S. Forest and Paper Association made similar allegations about the Japanese paper industry. According to this witness, anticompetitive business practices in Japan that deter paper imports include a complex and largely closed distribution system; interlocking relationships among manufacturers, agents, wholesalers, trading companies, printers, publishers and other end users, and financial institutions that restrict the entry of new suppliers; financial ties between manufacturers and distributors; preferential bank financing of even uncompetitive domestic companies; a lack of transparency in corporate purchasing practices; and inadequate enforcement of Japan's antimonopoly laws.<sup>23</sup> In April 1992, the U.S. and Japanese governments signed a "Paper Agreement" intended to increase market access for foreign firms exporting competitive paper products to Japan. In the view of U.S. industry, the agreement has not had its intended effect.<sup>24</sup>

THE JAPANESE FILM MARKET: The Advisory Committee also heard testimony from a representative from Eastman Kodak Co. concerning its complaints about distribution practices in the Japanese film market and the resulting U.S. trade case. Specifically, Kodak alleges that anticompetitive practices in Japan had effectively blocked Kodak's ability to sell film and other consumer products in that market. According to Kodak, these barriers consisted of unlawful private

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<sup>20</sup> See Testimony of Stephen Farrar, Director, International Business, Guardian Industries Corp., ICPAC Hearings, (May 17, 1999) Hearings Transcript at 118 - 125 [hereinafter Farrar ICPAC Spring Hearings Testimony]. See also Submission by Stephen Bolerjack, Counsel, Antitrust and Trade Regulation, Ford Motor Company on behalf of the National Association of Manufacturers (NAM), (Apr. 22, 1999) at 7 [hereinafter NAM Submission]; and Statement of John C. Reichenbach, Director of Government Affairs, PPG Industries, Inc., Before the Subcommittee on Antitrust, Business Rights and Competition of the Committee of the Judiciary, United States Senate (May 4, 1999).

<sup>21</sup> See Prepared Testimony of Peter S. Walters, Group Vice President, Guardian Industries Corp. before the Senate Judiciary Committee, Subcommittee on Antitrust, Monopolies and Business Rights (Oct. 2, 1998).

<sup>22</sup> It is extremely rare for a survey undertaken by the economic research division of the JFTC to result in a formal investigation.

<sup>23</sup> See Submission by Maureen Smith, Vice President, International, American Forest and Paper Association, ICPAC Hearings at 1-2 (Apr. 22, 1999) [hereinafter American Forest and Paper Association Submission].

<sup>24</sup> *Id.* at 3-5.



restraints at the manufacturing, distribution, and retail levels that were condoned and encouraged by the Japanese government. Despite substantial investments to penetrate the Japanese film market, Kodak's market share there has been slightly less than 10 percent for the last 25 years.<sup>25</sup>

In 1995 Kodak filed a petition with the USTR alleging that the Japanese government's toleration of systematic anticompetitive practices by Fuji Photo Film in Japan's consumer photographic paper and color film market were a violation of Section 301 of the U.S. trade laws.<sup>26</sup> In 1996 the USTR made a determination of unreasonable practices by the Japanese government in the sale and distribution of consumer photographic materials in Japan. The United States initiated dispute settlement procedures against Japan in the WTO, alleging that the Japanese government built, supported, and tolerated a market structure that impedes U.S. exports of consumer photographic materials to Japan, and in which restrictive business practices occur that also obstruct exports of these products to Japan. The United States challenged Japan's practices under Articles III (national treatment), X (transparency) as well as Article XXIII (under a claim of nullification and impairment).<sup>27</sup> The U.S. government pointed to policy statements and administrative guidance by the Japanese government and statements by advisory committees, industry associations, and others, which recommended actions that the Japanese industry should undertake to respond to foreign competition. The Large Scale Retail Store Law and the JFTC's approval of industry fair competition codes were also challenged by the U.S. government as measures by the government of Japan designed to impede access to the market. In its final report, issued on January 30, 1998, the WTO panel on film ruled that it was not convinced that the evidence demonstrated that the Japanese government measures violated its General Agreement on Tariffs and Trade (GATT) obligations.<sup>28</sup>

**ELECTRONIC EQUIPMENT:** In 1991 the American Electronics Association (AEA) requested that the USTR launch a sectoral negotiating initiative to address a broad range of governmental and private market access barriers that U.S. manufacturers of electronic equipment allegedly encountered

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<sup>25</sup> See Transcript of Testimony of Christopher Padilla, Director, International Trade Relations, Eastman Kodak Co., ICPAC Hearings (May 17, 1999), Hearings Transcript at 108-109 [hereinafter Padilla ICPAC Spring Hearings Testimony].

<sup>26</sup> See Privatizing Protection: Japanese Market Barriers in Consumer Photographic Film and Consumer Photographic Paper, Memorandum in Support of a Petition Filed Pursuant to Section 301 of the Trade Act of 1974, as amended (May 1995).

<sup>27</sup> The General Agreement on Tariffs and Trade (GATT) concept of nullification and impairment is related to the concept in Article 23 of reasonable expectations of the other party reflected. Under GATT (and now WTO) practice, a breach of an obligation can be a *prima facie* nullification and impairment, and the Dispute Settlement Understanding (DSU) also provides for nonviolation nullification and impairment.

<sup>28</sup> See Japan-Measures Affecting Consumer Photographic Film and Paper, WTO Doc WT/DS44/R (panel report issued 31 March 1998). Since the case was initiated, there have been changes in Japan that some commentators believe may increase the possibilities for foreign companies to sell in Japan in this sector. See Alan Wolff, Unanswered Questions: The Place of Trade and Competition Policy in the Seattle Round, Paper delivered at the OECD Conference on Trade and Competition, Paris (June 30, 1999) at 15-16 [hereinafter Wolff, Unanswered Questions].

in Japan. AEA surveyed its thousands of member companies and found that the most significant market barrier the companies perceived was exclusionary purchasing practices by Japanese industrial companies.<sup>29</sup> Among other grievances, AEA companies complained of refusals to deal despite lengthy efforts and superior offers, demands that U.S. manufacturers establish production in Japan, predatory pricing to exclude foreign competitors, discriminatory bank lending, discriminatory standards, and a complex distribution system that acts as a *de facto* barrier to sales by foreign companies.<sup>30</sup>

THE SODA ASH INDUSTRY: Anticompetitive practices in the Japanese soda ash industry have also been a point of contention. In 1973 four Japanese soda ash producers agreed to regulate the flow of imported soda ash through joint ownership of the Tokyo Terminal, Japan's sole facility for importing soda ash. The producers also pressured Japanese soda ash consumers not to purchase imported soda ash. In 1983 the JFTC found that the producers had formed an illegal cartel and ordered it to cease its activities. A second investigation by the JFTC in 1987 expressed concern that Japanese customers routinely requested permission from their domestic supplier before purchasing foreign soda ash.<sup>31</sup> According to one observer, the cartel overreached when its company presidents called on the president of the Sumitomo sales company and asked him not to disturb the market. The JFTC reacted with a warning, and the Japanese market for soda ash is said to be open.<sup>32</sup>

#### *U.S. Complaints about Japanese Competition Law*

The practices described above are but a sampling of the sectoral complaints that U.S. businesses have lodged against exclusionary or anticompetitive practices in Japan. Complaints have also been raised in other sectors, such as insurance,<sup>33</sup> semiconductors, amorphous metal transformers, some of which have resulted in formal trade cases and agreements. Some of these alleged barriers were thought to result from the lax enforcement of Japan's competition law (called the Anti-Monopoly Act).<sup>34</sup> Although the JFTC conducted several "surveys" of competitive conditions in

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<sup>29</sup> See Submission by Richard Cunningham, Steptoe & Johnson LLP, "Private Practices as Market Access Barriers," Attachment A, p. 1-2 (Jan. 21, 1999), for inclusion in the Advisory Committee record [hereinafter Cunningham Submission].

<sup>30</sup> *Id.*

<sup>31</sup> See OECD Materials on the Impact of Anticompetitive Practices on Trade Submitted to the WTO Working Group on Trade and Competition, March 11, 1998 [hereinafter OECD Materials].

<sup>32</sup> See Wolff, Unanswered Questions, at 17.

<sup>33</sup> See UNITED STATES TRADE REPRESENTATIVE, 1999 NATIONAL TRADE ESTIMATE ON FOREIGN TRADE BARRIERS 236-39 (1999) [hereinafter 1999 NATIONAL TRADE ESTIMATE].

<sup>34</sup> A few features of Japan's Anti-Monopoly Act that appeared to be discriminatory on their face or at least in their application -- e.g., requirements that foreign joint venture contracts be subject to notification to the JFTC, while domestic contracts were not. Those aspects of the law now appear to have been eliminated.



sectors that were prone to bilateral tension, virtually none of the surveys found any violations of Japan's Anti-Monopoly Act. Nonetheless, many of the sectoral disputes resulted in bilateral agreements that focused on some combination of private and governmental restraints. Examples include semiconductors, paper products, glass, automotive cars and parts, and construction services. In these accords the Japanese government promised to encourage imports and new business relationships with U.S. firms seeking entry into the Japanese market; it also promised to enforce its competition laws vigorously and to ensure that domestic manufacturers did not use their market power to coerce domestic distributors to refuse to handle competitive imports.

Systemic bilateral discussions about Japan's competition law and enforcement regime first occurred in the context of the Structural Impediments Initiative (SII) (1989-92), which represented a broad-based dialogue between the United States and Japan on a host of structural issues thought to impede trade and competitiveness. In the early 1990s the USTR and the Department of Justice together pressed the Government of Japan and the JFTC to make Japan's Anti-Monopoly Act enforcement "more effective" in deterring and punishing violations.<sup>35</sup> Notable developments that occurred through the SII process included increases in the JFTC's budget and personnel; increased penalties for anticompetitive conduct; increased enforcement actions against hard-core violators; reinstatement of criminal enforcement after a 16-year hiatus; and certain procedural improvements aimed at reducing obstacles to private litigation of antitrust violations.<sup>36</sup>

Bilateral discussions on deregulation and competition policy continued during the Clinton Administration, and further steps were announced under the auspices of the "Enhanced Initiative on Deregulation and Competition Policy" as part of the Clinton-Hashimoto Denver summit in June 1997.<sup>37</sup> Bilateral consultations continue to this day under that initiative.

### *U.S.-European Conflicts*

The perceived problem of private anticompetitive restraints that impede market access is by no means limited to disputes between the United States and Japan. U.S. companies have alleged

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<sup>35</sup> See Merit E. Janow, *U.S. Trade Policy Towards Japan and China: Integrating Bilateral, Multilateral and Regional Approaches*, in *TRADE STRATEGIES FOR A NEW ERA* (Geza Fezakuty and Bruce Stokes, ed., Council on Foreign Relations, 1998).

<sup>36</sup> Recently the JFTC has taken some action with respect to domestic cartel arrangements inhibiting foreign firms market access to the automotive glass markets. Specifically, in December 1999, the JFTC issued a formal finding of a violation under the Anti-Monopoly Act to associations of Japanese auto glass manufacturers and to a wholesale subsidiary of an auto glass manufacturer for agreeing not to sell imported replacement glass for domestic automobiles. See Japan Fair Trade Commission Press Release, "Regarding Notifications Given to Tokyo-Prefecture Branch of the Auto Glass Industry Association, and Auto Glass Eastern Japan, K.K." (December 21, 1999) available at <http://www.jftc.admix.go.jp/pressrelease/99.December/99122103.html>.

<sup>37</sup> For the most recent update on the status of the initiative, see Second Joint Status Report under the U.S.-Japan Enhanced Initiative on Deregulation and Competition Policy, May 1999, available at [www.pub.whitehouse.gov](http://www.pub.whitehouse.gov).

similar practices in Europe. For example, the U.S. Department of Justice's first formal positive comity request to the antitrust authorities of the European Union (EU), discussed more fully below, concerned complaints that a European airline reservation company was engaging in anticompetitive practices that prevented an American company from entering the European market.

In addition, Airbus Industrie has been alleged to engage in numerous practices with its European suppliers that artificially preclude or limit the extent to which non-European suppliers of avionics and other components can sell products for use on Airbus planes. These practices include the development and use of standards that discriminate against foreign suppliers, joint proposals by Airbus and a domestic component supplier to induce an airline to specify use of the European company's component, and conditioning non-European firms' participation in Airbus-related research and product development on agreements to relinquish proprietary technology without compensation.<sup>38</sup>

Other complaints of discriminatory practices in Europe cover products such as computers and telecommunications equipment.<sup>39</sup> During its hearings, the Advisory Committee heard detailed testimony about the potentially anticompetitive telecommunications standards being established by the European Telecommunications Standards Institute (ETSI), which could act as a hybrid restraint to market access.<sup>40</sup> According to economists who have studied the issue, non-European firms that make telecommunications equipment do not have an equal voice in setting European telecommunications standards. The European firms use their influence inside ETSI to choose standards that have been developed by European firms and disadvantage technologies developed by non-European firms. In another European matter, a representative from a U.S. business complained to the Advisory Committee about anticompetitive cross-subsidization by the German post office of its package delivery subsidiary.<sup>41</sup>

Classic international cartels, designed to fix prices, allocate markets, and jointly restrain output and delivery on a global basis, have long been alleged to operate in Europe in specific sectors

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<sup>38</sup> See Cunningham Submission at 2.

<sup>39</sup> See R. Shyam Khemani and Rainer Schöne, *International Competition Conflict Resolution: A Road Map for the WTO* 10, PSD OCCASIONAL PAPER NO. 33 (The World Bank, Private Sector Development Department), Oct. 1998 [hereinafter Khemani and Schöne].

<sup>40</sup> See Grindley, Salant, and Waverman Spring Hearings Submission; Waverman and Salant November Hearings Submission.

<sup>41</sup> See Submission by Larry Stevenson, Vice President, International Industrial Engineering, United Parcel Service, ICPAC Hearings, (May 17, 1999).



such as steel.<sup>42</sup> The international Heavy Electrical Equipment cartel was found to have fixed prices at higher than competitive levels in many national markets over a period of several decades.<sup>43</sup>

### *Complaints about Latin American Practices*

Anticompetitive practices that restrict market access have also been identified in Latin America. In one example, the Corn Refiners Association, Inc. filed a Section 301 petition in April 1998 alleging that the Mexican government denies fair and equitable market opportunities for U.S. exporters of high fructose corn syrup (HFCS) by encouraging and supporting an agreement between Mexican sugar growers and bottlers to limit use of HFCS.<sup>44</sup> The USTR initiated a Section 301 investigation in May 1998 and in May 1999 appears to have ended the Section 301 investigation but announced that the United States would continue to explore the Mexican government's role in limiting importation and purchases of HFCS. The USTR maintained that the Mexican government has "failed to refute allegations that it promoted and endorsed conclusion of an agreement to limit purchases of U.S. HFCS."<sup>45</sup> Some aspects of this case are also being addressed in the context of an ongoing WTO dispute settlement proceeding.

Two World Bank economists have described several examples of anticompetitive practices they learned of during their extensive consulting work in Latin American countries.<sup>46</sup> In Colombia, for example, the leading brewer allegedly has geographic market-sharing agreements with existing and potential competitors in neighboring countries. It also owns the sole bottle manufacturing plant and has exclusive-dealing clauses with the great majority of distributors. In another example, an attempt by a U.S. biscuit manufacturer to enter the Colombian market was stymied by the exclusive

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<sup>42</sup> See e.g., the discussion by Alan Wm. Wolff, *The Problems of Market Access in the Global Economy: Trade and Competition Policy*, in NEW DIMENSIONS OF MARKET ACCESS IN A GLOBALISING WORLD ECONOMY (OECD 1995). See also Mark Tilton, "Antitrust Policy and Japan's International Steel Trade," for presentation at a workshop on "The Changing Japanese Firm," Center on Japanese Economy and Business, Columbia University, December 11, 1998. There are also allegations that governments had a hand in the formation of a global production reduction program in the aluminum sector that may have evolved into a cartel. See *Foiled Competition: Don't Call it a Cartel, but World Aluminum has Forged a New Order*, THE WALL STREET JOURNAL, June 9, 1994, at A1; *Cartel Well Smell and Rhyme Quite Well, But Aluminum isn't Oil*, AMERICAN METAL MARKET, June 20, 1994, at 1; *Soda Makers Rip Aluminum Producers*, AMERICAN METAL MARKET, February 27, 1995, at 2.

<sup>43</sup> See Report (1998) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council, World Trade Organization, WT/WGTCP/2 33, n. 143 (Dec. 8, 1998) [hereinafter 1998 WTO Trade and Competition Working Group Report].

<sup>44</sup> See Petition for Relief Under Section 301 of the Trade Act of 1974, as Amended on Behalf of the Corn Refiners Association, Inc., April 2, 1998.

<sup>45</sup> United States Trade Representative Press Release 99-44, "United States to Further Explore Mexican Practices Affecting High Fructose Corn Syrup" (May 14, 1999).

<sup>46</sup> Khemani and Schöne, at 9.

distribution clauses between the dominant manufacturer and leading retailers. Instead, the U.S. manufacturer was required to enter into licensing and joint marketing agreements with the dominant firm.

In Ecuador, government enterprises and private sector firms are alleged to engage in price and market-sharing agreements in cement and steel. In addition, the industry associations for domestic oil and pharmaceuticals have persuaded the government to limit entry and to allow the coordination and increase of prices. Moreover, the distribution of automobiles remains the exclusive area of government-owned or -appointed dealers.<sup>47</sup>

*Anticompetitive and Exclusionary Practices Alleged to Exist in Other Countries*

Other sources, including the USTR's annual National Trade Estimate Report on Foreign Trade Barriers (NTE), have identified several other countries where anticompetitive or exclusionary practices allegedly inhibit the ability of foreign firms to penetrate a market. These problems have often been brought to the USTR's attention by U.S. firms that believe they have been shut out of these foreign markets. The NTE references do not represent conclusions that the listed problem violates either U.S. trade or antitrust laws. The grievances do, however, serve as an indication of agency concerns, and future Section 301 cases that may be self-initiated by USTR may be drawn from matters reported in the NTE. At the very least, the NTE listings provide some feel of both the nature and variety of practices that U.S. firms find troubling in foreign markets.

For example, the 1999 National Trade Estimate cited both Hungary and Hong Kong for lacking full competition in their telecommunications sectors.<sup>48</sup> Egypt does not have a basic law prohibiting anticompetitive practices by monopolies and cartels, and a few players dominate most sectors.<sup>49</sup> In India, the NTE noted, "one can find examples of both state-owned and private Indian firms engaging in most types of anticompetitive practices with little or no fear of reaction from government overseers or a clogged court system."<sup>50</sup> In Korea, U.S. firms in the telecommunications and semiconductor industries have expressed concerns that the Korean government is spurring consolidation of different chaebols' business lines in a manner that impedes open competition in

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<sup>47</sup> *Id.*

<sup>48</sup> 1999 NATIONAL TRADE ESTIMATE at 167, 173.

<sup>49</sup> *Id.* at 100.

<sup>50</sup> *Id.* at 187. The National Trade Estimate noted that these practices are not viewed as major hindrances to the sale of U.S. products and services at this time. U.S. firms are more concerned with issues such as market access, corruption, arbitrary and capricious behavior by their partners or government agencies and procurement discrimination. Yet as these issues are addressed, it is likely that anticompetitive practices will become a larger obstacle to the ability of U.S. firms to export to India.



Korea.<sup>51</sup> A number of other countries have been cited in the NTE for allegedly anticompetitive practices.<sup>52</sup>

### **Complaints Raised before the WTO Working Group**

Similar examples of anticompetitive or exclusionary practices that inhibit international trade have been brought to the attention of the WTO Working Group on the Interaction between Trade and Competition Policy. According to a report issued in 1998, the WTO Working Group said its members submitted examples of “actual cases of domestic export cartels, international cartels that allocated national markets among participating firms, unreasonable obstruction of parallel imports, control over importation facilities, exclusionary abuses of a dominant position, and vertical market restraints to competitors, certain private standard setting activities and anticompetitive practices involving industry associations.”<sup>53</sup>

One set of submissions to the WTO came from the OECD, which has discussed trade-related anticompetitive practices in the OECD Joint Group on Trade and Competition, held conferences on the issues involved, and conducted analytical studies. The OECD materials included discussion of horizontal agreements such as cartels, standardization, and certification restrictions; vertical agreements such as exclusive dealing and licensing agreements; abuse of dominant positions through rebate systems; and international mergers.<sup>54</sup> Clearly, only some of these areas of discussion reflect “access” problems arising from private restraints.

The OECD submission to the WTO identified a debate over exclusive dealing in the United Kingdom’s automobile industry. According to the OECD, some argued that competition policy was not adequately tackling exclusive agreements between domestic auto manufacturers and distributors. Consequently, potential auto importers were unable to secure access to distributors and were thus foreclosed from the UK’s domestic market. Others argued that restrictions on market access resulted primarily from other factors such as standards, government regulations, and trade measures rather than inadequate application of competition law.<sup>55</sup> The OECD submission also described how a

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<sup>51</sup> *Id.* at 288.

<sup>52</sup> Examples include South Africa, with its formerly weak competition laws and oligopolies and monopolies in certain industries (a new competition law went into effect in South Africa on September 1, 1999); Switzerland, with its allegedly high degree of cartelization; Taiwan, with its allegedly anticompetitive practices in the domestic cable TV industry; and Turkey with its monopolies in alcohol and telecommunications that are alleged to have impeded U.S. firms from selling in those markets. 1999 National Trade Estimate, at 384 (South Africa), 387 (Switzerland), 394 (Taiwan), and 411 (Turkey).

<sup>53</sup> 1998 WTO Trade and Competition Working Group Report at 31, para. 84.

<sup>54</sup> OECD Materials at 1-3.

<sup>55</sup> *Id.* at 2.

domestic producer of fertilizer in Norway controlled distribution channels by using a rebate system that acted as a barrier to entry into the domestic market.<sup>56</sup>

The individual country submissions to the WTO Working Group also provide examples that have been challenged as restricting market access. The EU's submission to the WTO identified several cartels that it said had a significant international dimension.<sup>57</sup> These included a European cement cartel, in operation since 1983, which had formed a coalition to deal with the threat of Greek cement exports to several Member States.<sup>58</sup> European carton board producers formed a cartel to fix prices and regulate their market.<sup>59</sup> European producers of steel beams agreed to preserve their traditional pattern of trade and agreed on price increases in various Member States.<sup>60</sup> The European Commission (EC) has also challenged an organization (SCK) that hires out mobile cranes in the Dutch market. SCK established a certification system to guarantee the quality of cranes used in the crane hire business. SCK members, most of whom are Dutch firms, refused to certify these cranes from nonaffiliated firms, which in effect prevented foreign firms from entering the market.<sup>61</sup>

EU cases have not been limited to cartels. The EU also identified examples where abuse of dominance hindered entry into a market. The EU's Court of First Instance recently condemned a practice by a group of dominant shipping companies that instituted a low price on shipping between Northern Europe and the Republic of Congo in order to eliminate a competitor.<sup>62</sup> The EU also has challenged the exclusive or preferential supply contracts of Roche, the world's leading vitamin

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<sup>56</sup> *Id.* at 3.

<sup>57</sup> Submission by the European Community and its Member States, "Impact of anti-competitive practices on trade," Working Group on the Interaction Between Trade and Competition Policy, World Trade Organization, March, 1998 (hereinafter WTO Submission by the European Community and its Member States). Here again, this Advisory Committee has not tried to evaluate whether the cases identified by the EC are market access cases in the same sense as that term may be used in trade policy circles.

<sup>58</sup> Com CE Dec. 94/815, 1994 O.J. (L 343), TPI, T-25/95 cited in the WTO Submission by the European Community and its Member States at 5.

<sup>59</sup> Com CE Dec. 94/601, 1994 O.J. (L 243), TPI, T-295/94 cited in the WTO Submission by the European Community and its Member States at 5.

<sup>60</sup> WTO Submission by the European Community and its Member States at 6.

<sup>61</sup> CFI 22 Oct. 1997. "Dutch Cranes" (T 213/95 and T-18/96) cited in the WTO Submission by the European Community and its Member States at 6.

<sup>62</sup> TPI T-24/93, October 8, 1996 cited in the WTO Submission by the European Community and its Member States at 9.



manufacturer, concluding that the contracts improperly tied the most important buyers of bulk vitamins to Roche and prevented its chief competitors from supplying these products.<sup>63</sup>

The EU also described how the two manufacturers in the German ice cream market used vertical restraints, in this case freezer cabinets provided gratis exclusively for their ice cream to prevent competitors from selling to the tied stores.<sup>64</sup> This is a case that might be analyzed very differently under U.S. law, which might see the restraint as a legitimate means to compete rather than as an anticompetitive foreclosure.

Individual countries have also identified anticompetitive practices that they allege inhibit access to EU markets. For example, in 1995, the French antitrust authority condemned 31 private civil engineering firms for sharing the construction markets on the Train à Grande Vitesse (TGV) high speed rail project in northern France. One objective of the cartel was to prevent foreign companies from entering the market.<sup>65</sup> In 1988 the French also fined Lilly France for granting substantial rebates to hospitals on an antibiotic patented and manufactured by Lilly France when the customers also purchased a heart disease drug that the pharmaceutical company made. The French authority concluded that this practice prevented hospitals from turning to more competitive providers of the heart disease drug, including foreign competitors. In 1992 the Italian competition authority investigated an agreement on harbor and berthing services among three shipowners' associations. The agreement provided substantial discounts on the maximum charges for the services supplied in each port. Members of the association, virtually all Italian-registered ships, qualified while foreign ships did not. The practice was subsequently discontinued.<sup>66</sup>

In its submission to the WTO, Canada identified anticompetitive practices within its borders that have an impact on international trade.<sup>67</sup> In one example, the Interac case, a company was alleged to have abused its dominant position in the supply of shared electronic network services in Canada by leveraging the control of demand deposits and automated banking machines in Canada

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<sup>63</sup> Com CE, 9.6.76, O.J. (L 223), CICE 13.2.79, n 85/76, Rec. 1979, P: 461 cited in the WTO Submission by the European Community and its Member States at 9.

<sup>64</sup> CFI, June 8, 1995, case T-7/93 Langese-Iglo GmbH v. Commission (1995) E.C.R. II-1533 and case T-8/93 Scholler Lebensmittel GmbH v. Commission (1995) E.C.R. II-1611 cited in the WTO Submission by the European Community and its Member States at 10.

<sup>65</sup> WTO Submission by the European Community and its Member States at 16.

<sup>66</sup> *Id.*

<sup>67</sup> Submission from Canada, The Impact of Anticompetitive Practices of Enterprises and Associations on International Trade, Working Group on the Interaction Between Trade and Competition Policy, World Trade Organization, March 11, 1998.

through membership and participation restrictions in the Interac network. The Canadian competition tribunal approved a consent order designed to improve competition in the market.<sup>68</sup>

U.S. firms have also been alleged to use anticompetitive restraints to prevent foreign companies from entering the U.S. market. In one example, the Justice Department recently filed a complaint against Dentsply, an American manufacturer of artificial teeth, alleging that the firm engaged in exclusionary conduct to deny rival tooth manufacturers access to the primary distribution channels for artificial teeth in the United States. According to the U.S. complaint, Dentsply, using its monopoly position in the U.S. market, threatened to terminate its relationship with dealers that sold teeth produced by Dentsply's competitors, including two foreign manufacturers.<sup>69</sup>

### **Evidence from Business Associations**

While little rigorous empirical or survey work has been conducted on market access restraints from exclusionary business practices, several business groups have conducted membership surveys in an effort to assess the extent to which foreign private anticompetitive practices are perceived to restrict market access. The numbers generated by these surveys do not represent statistically significant results, but they are summarized here to provide a sense of the problems that many businesses find troublesome.

In June 1999 the Business and Industry Advisory Committee (BIAC) to the OECD published the results of its Survey of Business Competition Law Concerns.<sup>70</sup> BIAC received 60 company responses from several different jurisdictions and types of businesses.<sup>71</sup> Nearly half (46 percent) of those members who responded agreed or strongly agreed that anticompetitive practices significantly limit their ability to enter new export markets. Approximately 29 percent of BIAC survey respondents agreed or strongly agreed that these practices limit their ability to expand in their primary export markets, while 41 percent of survey respondents agreed or strongly agreed that the enforcement of competition laws is ineffective in new export markets.<sup>72</sup> In addition to conducting

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<sup>68</sup> *Id.* at 6-7.

<sup>69</sup> See Complaint by the United States, *United States v. Dentsply International, Inc.*, Civil Action No. 99-005, (D.Del), January 5, 1999.

<sup>70</sup> BIAC Report on the Survey of Business Competition Law Concerns, presented before the OECD Conference on Trade and Competition, Paris, France (June 29, 1999) [hereinafter BIAC Report].

<sup>71</sup> Responses came from ten countries: Belgium, Canada, Finland, France, Germany, the Netherlands, New Zealand, the Republic of Korea, Turkey and the United States. BIAC Report.

<sup>72</sup> The BIAC survey also asked its members to identify the relative importance of anticompetitive practices in a respondent's ability to expand or enter markets in both primary export markets and new export markets. Fourteen respondents listed anticompetitive practices as one of the top three factors in inhibiting growth in export markets. Trade policy was listed as one of the top three factors in 32 different survey responses, particularly in those surveys that listed the Australia, China, and the United States as their primary export markets. One-fourth of the respondents agreed or



a survey of its members, the BIAC has also gone on record as recommending policy proposals to address the concerns of private actions and artificial barriers that impede market access and recommended greater cooperation among competition authorities.<sup>73</sup>

In response to an invitation by this Advisory Committee, the Business Roundtable surveyed their CEOs. Of the 54 respondents, 30 percent indicated that they had encountered market access barriers attributable to private anticompetitive practices abroad.<sup>74</sup> The U.S. Council for International Business, in an appearance before the Advisory Committee, urged continued analysis in areas such as market access and contestability.<sup>75</sup> In a submission to the Advisory Committee, the International Chamber of Commerce described U.S. business concerns about the potential for private anticompetitive restraints to impede market access.<sup>76</sup> The Transatlantic Business Dialogue (TABD) has also urged all countries to make market access a priority in applying competition laws and regulations.<sup>77</sup>

### **The Advisory Committee's Assessment of the Evidence**

As this quick summary demonstrates, the level of quantitative and empirical economic analysis concerning private and government anticompetitive restraints that inhibit market access still remains quite limited.<sup>78</sup> Examples of exclusion range from direct evidence to much indirect,

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strongly agreed that competition law enforcement is ineffective in their primary export markets. In addition, 44 percent of the respondents agreed or strongly agreed that the enforcement of competition laws by the government in new export markets is unpredictable, too costly or too burdensome. For primary export markets, 27 percent agreed or strongly agreed that this was a problem. BIAC Report.

<sup>73</sup> See BIAC Discussion Note on the Interaction between Two Policy Fields, "Trading to Compete and Competing to Trade" (1995); BIAC Consultation with the OECD Liaison Committee, "Pursuing Domestic Policy Objectives in a Global Economy;" (Nov. 8, 1996); Business Statement to the 1996 OECD Council Meeting at a Ministerial Level, (May 21, 1996).

<sup>74</sup> See Submission by Robert Weinbaum, Office of General Counsel, General Motors Corporation on behalf of the Business Roundtable Task Forces on International Trade and Investment and on Government Regulation, ICPAC Hearings (Apr. 22, 1999) at 3 [hereinafter Business Roundtable Submission].

<sup>75</sup> See Submission by the U.S. Council for International Business (USCIB), ICPAC Hearings (Apr. 22, 1999) at 2 [hereinafter USCIB Submission].

<sup>76</sup> See International Chamber of Commerce, Competition and Trade in the Global Arena: An International Business Perspective, Draft Report of the ICC Joint Working Party on Competition and International Trade, February 12, 1998, p 1. citing ICC Programme of Action, 1996.

<sup>77</sup> See Transatlantic Business Dialogue (TABD) Overall Conclusions, Seville, Spain (Nov. 11, 1995) [hereinafter TABD Overall Conclusions]. See also TABD Berlin Communiqué (Oct. 30, 1999) at 50.

<sup>78</sup> Several commentators and advocates have decried the lack of empirical work on this issue. See e.g., Submission by Alan Wolff, Thomas Howell, and John Magnus, Dewey Ballantine, "Trade and Competition Policy: A Suggested

circumstantial and qualitative evidence. Nor are private anticompetitive restraints limited only to those countries where the problem recurs as a source of tension.<sup>79</sup> Many of the trade complaints begin with less (and different) evidence than would be required to demonstrate an antitrust violation.

The uneven quality of the evidence in many specific instances is also reflected in the corresponding absence of empirical analyses that determine or estimate the magnitude of the effects of these competition policy problems on global trade flows or the global economy. This very issue is itself a matter of debate. For example, the International Chamber of Commerce (ICC) notes that certain elements of the business community assert that there is little or no evidence of private anticompetitive acts which have not “(a) received the imprimatur of government, or (b) cannot be dealt with by domestic legislation.”<sup>80</sup> According to the ICC, other segments of the business community maintain that evidence of international anticompetitive acts does exist and that these are a substantial barrier to market access.<sup>81</sup> Similarly, the OECD has had difficulty quantifying the extent to which anticompetitive restraints inhibit international trade. As a senior official of the OECD stated, “[i]t is often said that as trade barriers decline, private anticompetitive practices become a more important and more pervasive restriction on market access. The OECD’s trade and competition work has failed to turn up a large body of convincing evidence for that hypothesis, but it continues to examine the question.”<sup>82</sup>

In the view of this Advisory Committee, this record, while uneven, is sufficient to show that private, governmental, and mixed public-private restraints that inhibit market access are a problem. Additional analytical and empirical work of an international and comparative nature is needed to better establish the extent and nature of private, governmental and mixed public-private restraints

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U.S. Strategy,” ICPAC Hearings (Nov. 4, 1998) at 4 [hereinafter Dewey Ballantine Submission].

<sup>79</sup> Advisory Committee Member Richard Simmons divided nations where anticompetitive practices occur into three groups: “(A) Developing nations which protect their home market [by] encouraging growing manufacturing companies to export to achieve critical mass. Unfortunately, many countries continue these anticompetitive practices long after the industries involved are large enough to compete effectively in the world markets; (B) Developed nations which act in groups utilizing market sharing agreements (formal or informal) to agree not to compete in the participants’ home markets and compete only in identified ‘fair game’ markets; and (C) Non-market economies like the former Commonwealth of Independent States (CIS) countries where there is no body of law which prevents anticompetitive practices from occurring.” Letter from Advisory Committee Member Richard P. Simmons to ICPAC Executive Director Merit E. Janow, February 2, 1998.

<sup>80</sup> See Replies formulated by the ICC Joint Working Party on Competition and International Trade to Questions Asked by Members of the WTO Working Group on the Interaction Between Trade and Competition Policy in Geneva in March 1998, International Chamber of Commerce (October 6, 1998) at 2.

<sup>81</sup> *Id.*

<sup>82</sup> See Joanna R. Shelton, then-Deputy Secretary-General, OECD, “Competition Policy: What Chance for International Rules?,” submission by Bernard Phillips, OECD, ICPAC Hearings (Apr. 22, 1999) at 6. [hereinafter Shelton, Competition Policy].



of trade with international or global consequences. But the Advisory Committee also believes that the current record is sufficient for the U.S. government to make some policy judgments about the nature of the global trade and competition problems.<sup>83</sup> This Advisory Committee does not assume that national agencies can naturally be relied upon to remove or address the distortions in their own economy produced by private anticompetitive or exclusionary restraints. As this discussion has illustrated, many competition problems also implicate acts or omissions by governments and are not self-correcting. For this reason, the absence of remedial action by a government does not indicate that problems do not exist.

The Advisory Committee believes that no single policy tool is capable of addressing all aspects of the competition problems raised here. Thus, it has examined several different approaches that could be used in various situations. Bilateral agreements with positive comity offer a potentially useful instrument for addressing private restraints. Extraterritorial enforcement of U.S. antitrust laws may be necessary and effective in some circumstances. And further development of international competition policy initiatives may prove extremely useful in the longer run. As discussed in the remainder of this chapter, by making certain adjustments in each of these approaches, the United States can improve its methods for resolving problems that intersect both trade and competition policy concerns.

### POSITIVE COMITY

Cooperation among competition authorities has been and will be one of the most viable alternatives in addressing anticompetitive restraints that affect international trade. Since instances of anticompetitive conduct occurring outside domestic borders that impact or affect competition are becoming more prevalent, governments have worked to advance cooperation through the initiation of bilateral agreements. One mechanism contained within bilateral accords that has gained increasing support and recognition from the international community is the concept of positive comity.

“Traditional comity” considerations have a long history in the extraterritorial enforcement of U.S. antitrust laws.<sup>84</sup> Nonetheless, the extraterritorial application of U.S. law has caused

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<sup>83</sup> As the 1997 WTO annual report states, “While no empirical information of a systematic nature is available for measuring the size of the [enterprise practices that restrict or distort international trade] problems in practice that remain unresolved through existing laws and mechanisms, there would seem to be a widespread view that enhanced international cooperation is desirable.” *Chapter Four: Special Study on Trade and Competition Policy*, WTO ANNUAL REPORT FOR 1997, at 4.

<sup>84</sup> The term “comity” refers to the general principle that a country should take other countries’ important interests into account in its law enforcement in return for their doing the same. Traditional comity has been defined as “the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws.” *Hilton v. Guyot*, 159 U.S. 113, 164 (1895), *Black’s Law Dictionary*, (6<sup>th</sup> ed. 1990). See Discussion at Annex 1-C.

significant tensions over jurisdiction and sovereignty issues between the United States and its foreign counterparts. “Positive comity” attempts to avoid these conflicts by placing initial responsibility for investigation of market access barriers into the hands of the jurisdiction where the alleged anticompetitive conduct occurs. Since positive comity is a relatively untested mechanism and is premised on a high degree of trust and confidence in the antitrust enforcement policies of both jurisdictions involved, its actual application and potential are not fully known. The Advisory Committee believes, however, that use of positive comity as one element in the host of options available, including both unilateral and multilateral initiatives, holds the potential in discrete instances to reduce international conflicts and open foreign markets that are currently blocked by market access barriers.

In its most basic structure, positive comity is a mechanism whereby the jurisdiction most closely associated with the alleged anticompetitive conduct assumes primary responsibility for the investigation and possible remedy. Specifically, when anticompetitive conduct that adversely affects the important interests of one party occurs within the borders of another party, the “affected party” may request that the “territorial party” initiate appropriate enforcement actions. In so doing, positive comity attempts to reap the benefits associated with cooperation by avoiding potential conflicts or disputes pertaining to jurisdictional issues. Positive comity potentially obviates the need to pursue extraterritorial enforcement if the territorial party can adequately resolve or remedy the anticompetitive activities. Additionally, by assigning initial jurisdiction to the territorial party, the investigation will benefit from enhanced access to documents and witnesses and thus greater ability and resources to remedy the anticompetitive conduct.

## **Evolution of Positive Comity**

Although the term “positive comity” did not come into use until the early 1990s, the theory and practice of the basic principles of positive comity originated several decades earlier. The genesis of positive comity principles in bilateral cooperation agreements can be traced back to the 1954 Friendship, Commerce, and Navigation Treaty between Germany and the United States. The agreement acknowledged the existence of business practices that impeded or had “harmful effects” on commerce between the two signatory countries, and stipulated that “each Government agrees upon the request of the other Government to consult with respect to any such practices and to take such measures, not precluded by its legislation, as it deems appropriate with a view to eliminating such harmful effect.”<sup>85</sup> Similar provisions also were contained in numerous other bilateral cooperation agreements from the same time period, such as agreements between the United States and Denmark, France, Greece, Italy, and Japan.<sup>86</sup> While some observers have hailed these early

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<sup>85</sup> See Kurt E. Markert, *Recent Developments in International Antitrust Co-operation*, 13 ANTITRUST BULL. 355, 359-60, fn. 11 (1968).

<sup>86</sup> ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, COMMITTEE ON COMPETITION LAW AND POLICY REPORT ON POSITIVE COMITY, DAFNE/CLP(99)19 (June 14, 1999) at 8, para. 29 (citing Competition Law Enforcement: International Co-operation in the Collection of Information, OECD, 1984, at paras. 98-114) [hereinafter OECD REPORT



undertakings as a significant step toward cooperation through positive comity, there is little indication that these provisions were used.<sup>87</sup>

The concept of positive comity also was embedded in several multilateral initiatives adopted in early postwar years. In 1960 a GATT group of experts recommended that a nation “should accord sympathetic consideration to requested consultations . . . [and] if it agrees that such harmful effects are present, it should take such measures as it deems appropriate to eliminate these effects.”<sup>88</sup> As the OECD Report on Positive Comity notes, this provision appears to have been first invoked during the photographic film dispute before the WTO although consultations did not occur.<sup>89</sup>

The OECD first incorporated positive comity principles in its recommendations pertaining to competition and trade issues when it adopted the 1973 Recommendation Concerning a Consultation and Conciliation Procedure on Restrictive Business Practices Affecting International Trade.<sup>90</sup> Over the years, the OECD has refined and modified the recommendation on positive comity and most recently revisited the concept in its 1995 Recommendation. The OECD proposes that a member country may request consultation with another member country when it believes anticompetitive activity occurring in another country is affecting its interests. If the territorial party “agrees that enterprises situated in its territory are engaged in anticompetitive practices harmful to the interest of the requesting country,” then it should “attempt to ensure that these enterprises take remedial action, or should itself take whatever remedial action it considers appropriate, including actions under its legislation on anticompetitive practices or administrative measures, on a voluntary basis and considering its legitimate interests.”<sup>91</sup> If the affected country does not believe that the territorial party has handled the matter satisfactorily, the OECD Recommendation makes available a voluntary mediation mechanism whereby the Competition Law and Policy Committee acts as a medium for possible conciliation between the two Member countries.<sup>92</sup> To the best of the Advisory Committee’s knowledge, this mediation provision has not been pursued by any OECD member country.

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ON POSITIVE COMITY].

<sup>87</sup> *Id.* at 8.

<sup>88</sup> OECD REPORT ON POSITIVE COMITY at 8, para. 30 (citing Committee on Restrictive Business Practices, Report on the Problems Relating to the Control of Restrictive Business Practices Affecting International Trade, Jan. 12, 1965, E.41450, at 3).

<sup>89</sup> *Id.* at 8.

<sup>90</sup> OECD, Recommendation Concerning a Consultation and Conciliation Procedure on Restrictive Business Practices Affecting International Trade [C(73)99(Final)].

<sup>91</sup> OECD, Revised Recommendation of the Council Concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade [C(95)130(Final)], at B.5(c).

<sup>92</sup> *Id.* at B.8.

### *1991 U.S.-EC Agreement*

Positive comity did not become a formal component of an international agreement until the U.S.-EC Agreement was negotiated and signed in 1991.<sup>93</sup> The inclusion of positive comity principles in the Agreement marked a significant departure and a step forward from previous international agreements. While the term positive comity was not explicitly used or defined in the Agreement, statements by the architects of the Agreement led to widespread recognition and discussion of the concept.<sup>94</sup>

Based on the recognition that anticompetitive practices occurring in one jurisdiction may negatively impact the interests of another jurisdiction, Article V of the allows a jurisdiction affected by anticompetitive practices to notify the jurisdiction in which the alleged conduct is occurring and to request that it commence appropriate enforcement action.<sup>95</sup> Such a request is predicated on an assumption that the alleged conduct violates the antitrust laws in the jurisdiction where it occurs. Article V is premised on purely voluntary cooperation; the territorial party retains complete discretion as to whether to initiate an investigation and any subsequent enforcement action against the alleged violations.<sup>96</sup> Nor do the Agreement and any formal referral preclude the affected party from pursuing its own investigation and subsequent enforcement action regardless of any action or inaction by the territorial party.<sup>97</sup> Additionally, Article V requires the territorial party to tell the affected party whether it plans to investigate the disputed practices, and, if so, what the outcome of the investigation is.<sup>98</sup>

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<sup>93</sup> Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws (Sept. 23, 1991), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,504; 61 Antitrust & Trade Reg. Rep. (BNA) 382-85 (Sept. 26, 1991; O.J. L 95/45 (1991), corrected by O.J. L 131/38 (1995). The implementation of the 1991 Agreement was delayed pending a legal challenge initiated by several Member states. The European Court of Justice ruled that the Commission did not have the necessary authority to enact the 1991 Agreement. *France v. Commission*, Case C-327/91 (Aug. 9, 1994); [1994] 5 C.M.L.R. 517. The Commission, subsequently, was allowed to enter into a nearly identical agreement in April 1995. 1995 O.J. (L95) 45, corrected, 1995 O.J. (L131) 38.

<sup>94</sup> See, e.g., Claus Dieter Ehlermann, Address, The Role of Competition Policy in a Global Economy, Brussels (June 22, 1994); EUROPEAN COMMISSION, TWENTY-FIRST REPORT ON COMPETITION POLICY, at 54, para. 64 (1992).

<sup>95</sup> 1991 Agreement, art. V(2), 4 Trade Reg. Rep. (CCH) at ¶21,430.

<sup>96</sup> 1991 Agreement, art. V(3), (4), 4 Trade Reg. Rep. (CCH) at ¶21,430.

<sup>97</sup> 1991 Agreement, art. V(4), 4 Trade Reg. Rep. (CCH) at ¶21,430.

<sup>98</sup> 1991 Agreement, art. V(3), 4 Trade Reg. Rep. (CCH) at ¶21,430.



*1998 Supplemental Agreement*

On June 4, 1998, the United States and the European Commission signed an antitrust cooperation agreement that supplements the positive comity provisions outlined in the 1991 Agreement.<sup>99</sup> Importantly, the 1998 Agreement reaffirmed both the U.S. and the EC commitment to pursuing cooperative efforts through the use of positive comity. Furthermore, the 1998 Agreement took steps designed to clarify the procedures for formal referrals of cases under the terms of the Agreement. First, the supplemental provisions list appropriate instances for deferral of extraterritorial enforcement when the territorial party is proceeding with an investigation.<sup>100</sup> Deferral should normally occur, for example, when the anticompetitive conduct can be “fully and adequately investigated” and subsequently remedied by the territorial party.<sup>101</sup> In an attempt to avoid protracted, lengthy investigations, the 1998 Agreement recommends that investigations generally should be completed within six-months.<sup>102</sup> Additionally, the 1998 Agreement outlines an appropriate course of action in which the territorial party should engage during the course of an investigation.<sup>103</sup> If these conditions are met, however, and the affected party chooses not to defer its own investigation, it must tell the territorial party why it is pursuing a separate investigation.<sup>104</sup> As in the 1991 Agreement, both the affected party and the territorial party reserve the right to pursue their independent action as to the conduct at issue.

The 1998 Agreement appears to address, in part, concerns that had arisen regarding the positive comity process during the first formal referral and the subsequent debate occurring throughout the international antitrust community. The 1998 Agreement, itself, substantially improves upon various components of the inaugural 1991 Agreement, including addressing timing and communication concerns put forth by those involved in the Amadeus referral (see below). These

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<sup>99</sup> Agreement Between The Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws (June 4, 1998), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶13,504A (June 17, 1998) [hereinafter 1998 Agreement].

<sup>100</sup> 1998 Agreement, art. IV.

<sup>101</sup> 1998 Agreement, art. IV(2)(b).

<sup>102</sup> 1998 Agreement, art. IV(2)(c)(v). Despite the inclusion of this time frame, U.S. government officials have expressed some pessimism as to whether a six-month time frame is feasible for any antitrust investigation, particularly one with an international component such as a market access case. See William J. Baer, then-Director, Bureau of Competition, U.S. Federal Trade Commission, *International Antitrust Policy*, 1999 FORDHAM CORP. L. INST. 247, 255 (B. Hawk, ed. 1999).

<sup>103</sup> A competition authority investigating a formal positive comity request should: (1) devote adequate resources to the investigation; (2) pursue all reasonably available sources of information; (3) regularly update and notify the Affected Party as to the status of the investigation and provide relevant documents obtained during the investigation; (4) take into account views of the Affected Party during the entire process. 1998 Agreement, art. IV(2)(c).

<sup>104</sup> *Id.*

improvements were noted by then-EC Commissioner Karel Van Miert through an acknowledgment that the supplemental provisions constituted “a substantial step towards closer cooperation through confidence building.”<sup>105</sup>

Following up on the advancement of positive comity principles in the 1991 and 1998 Agreements between the United States and the European Commission, the United States has entered into agreements containing positive comity provisions with Canada,<sup>106</sup> Israel,<sup>107</sup> Brazil,<sup>108</sup> and Japan,<sup>109</sup> and an agreement has recently been signed between the EC and Canada.<sup>110</sup> The positive comity provisions in these agreements closely mirror the provisions agreed upon in the 1991 U.S.-EC Agreement. Although none of these subsequent agreements incorporate the “next generation” provisions contained in the 1998 U.S.-EC Supplemental Agreement, they do set forth the primary requirements for the application of positive comity. None has yet been tested in a formal referral. It is clear, however, from the mere enactment of the agreements that several jurisdictions are cooperating and that a requisite level of confidence is developing between the respective competition enforcement authorities in jurisdictions with strong antitrust regimes.

In this vein, the agreement recently enacted with Japan has generated significant attention and debate, particularly from U.S. congressional representatives. A coalition of twenty-six Senators sent a letter to the President expressing their belief that such an agreement with Japan would be inappropriate based on Japan’s apparent failure to honor past agreements.<sup>111</sup> While expressing significant doubt as to whether the positive comity agreement could effectively reduce or eliminate

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<sup>105</sup> Karel van Miert, then-Commissioner, EC Commission, *International Cooperation in the Field of Competition: A View from the EC*, 1998 FORDHAM CORP. L. INST. 13, 24 (B. Hawk, ed. 1998).

<sup>106</sup> Agreement Between the Government of the United States of America and the Government of Canada Regarding the Application of Their Competition and Deceptive Marketing Practices Laws (Aug. 3, 1995), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶13,503 (Apr. 23, 1997).

<sup>107</sup> Agreement Between the Government of the United States of America and the Government of the State of Israel Regarding the Application of Their Competition Laws (Mar. 15, 1999), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶13,506 (Mar. 17, 1999).

<sup>108</sup> Agreement Between the Government of the United States of America and the Government of the Federative Republic of Brazil Regarding Cooperation Between Their Competition Authorities in the Enforcement of Their Competition Laws (Oct. 26, 1999), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶13,501 (Nov. 3, 1999).

<sup>109</sup> Agreement Between the Government of the United States and the Government of Japan Concerning Cooperation on Anticompetitive Activities (Oct. 7, 1999), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶13,507 (Oct. 13, 1999).

<sup>110</sup> Agreement Between the European Communities and the Government of Canada Regarding the Application of Their Competition Laws, *reprinted in* 1999 O.J. (L 175).

<sup>111</sup> See Prepared Testimony of Senator Mike DeWine, Before the U.S. Senate Judiciary Antitrust, Business Rights and Competition Subcommittee (May 4, 1999); see Prepared Testimony of Senator Herb Kohl, Before the U.S. Senate Judiciary Antitrust, Business Rights and Competition Subcommittee (May 4, 1999).



market access barriers, the Senators noted that, if indeed enacted, close monitoring of the agreement should occur.

### **Positive Comity in Practice**

While much discussion on the international stage has focused on the feasibility of positive comity, its effectiveness in actual cases still remains difficult to assess. The number of instances where positive comity principles have been employed remains very limited. Despite this fact, positive comity has been used as a vehicle for cooperation in several specific instances and the experiences gained by those examples can provide some level of insight as to its viability in concrete circumstances.

#### *Formal Use: Computer Reservation Systems*

In the only instance thus far of a formal referral under the 1991 U.S.-EC Agreement, the United States announced on April 28, 1997, that it had formally requested that the EC investigate alleged anticompetitive conduct occurring in Europe in the computer reservation system (CRS) industry.<sup>112</sup> According to a statement released by the Department of Justice, the Antitrust Division had concerns that three national flag European airlines that own Amadeus, the dominant CRS in Europe, were denying a United States-based CRS of the necessary fare data and functionality needed to compete effectively.<sup>113</sup> The Sabre Group, a CRS based in the United States and a would-be competitor of Amadeus in Europe, had lodged several complaints with the Antitrust Division regarding the practices of Amadeus and its carrier owners. A computer reservation system acts as a large database that contains fare, ticketing, and schedule information for airlines, trains, and other modes of transportation. Travel agents access the CRS to schedule and ticket reservations from a wide array of different transportation carriers. A CRS can be truly effective, and thus competitive in the marketplace only if its database contains complete and up-to-date information from a large percentage of carriers and is able to provide air travel services, such as ticket on departure and frequent flyer benefits (this is known as “functionality”).

The Antitrust Division asserted that the European “airlines did not give Sabre many air fares on a timely basis, refused to provide it with certain promotional or negotiated fares, and denied Sabre the ability to perform certain ticketing functions, although they provided these fares and functions

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<sup>112</sup> U.S. Department of Justice Press Release, “Justice Department Asks European Communities to Investigate Possible Anticompetitive Conduct Affecting U.S. Airlines’ Computer Reservation Systems,” (Apr. 28, 1997) [hereinafter U.S. Department of Justice Computer Reservation Press Release]. The referral antedated the 1998 Agreement and the application of the Agreement’s terms is unclear.

<sup>113</sup> Lufthansa, Air France, and Iberia Airlines, the national flag carriers of Germany, France, and Spain, respectively each own 29 percent of the Amadeus CRS. The remainder is held by Continental Airlines. At one time, SAS, the dominant carrier in Scandinavia, also held an interest in Amadeus. Although it no longer possesses an ownership interest in Amadeus, SAS markets the Amadeus CRS in Scandinavia.

to Amadeus.”<sup>114</sup> Despite a preliminary investigation undertaken by the Antitrust Division, then-Acting Assistant Attorney General Joel Klein noted that “[t]he European Commission is in the best position to investigate this conduct because it occurred in its home territory and consumers there are the ones who are principally harmed if competition has been diminished.”<sup>115</sup> While Assistant Attorney General Klein emphasized that the EC maintained an advantage in pursuing an investigation and possible remedial action regarding the alleged conduct, he also implied that the United States retained the option of pursuing its own investigation as it had a “strong interest” in the case since “U.S. companies may have been blocked from becoming effective competitors and the exclusionary conduct might have adverse effects on U.S. markets as well.”<sup>116</sup>

Following the formal referral, the EC reiterated its support of the positive comity process through remarks made by its director-general for competition, Alexander Schaub, who noted that the referral represented an important first step in this heightened level of cooperation between the two jurisdictions. Furthermore, he illustrated the EC’s commitment to this specific case and the reciprocity factor associated with all positive comity requests, stating that the EC had “given our people the instruction to consider this as a priority case because we are aware of the fact that how we handle American positive comity requests will certainly determine largely how the U.S. authorities will handle our future requests.”<sup>117</sup>

Despite the EC’s announced commitment to the Amadeus referral, some in the United States expressed concern as to the pace and attentiveness afforded to the EC’s investigation. The U.S. Senate Judiciary Committee, acting in its oversight role, convened several hearings designed to study and evaluate the positive comity process in general and its relevant application in international antitrust cooperation. As will be discussed in greater detail below, one of the witnesses testifying at the hearings was a representative of The Sabre Group. Sabre relayed its own experiences with the positive comity referral process and expressed its reservations regarding the delay associated with the referral and several procedural “obstacles” confronting the process in general. Furthermore, Sabre set forth several recommendations designed to enhance the process in light of the firm’s experiences during the Amadeus positive comity request, including increased communication between all involved parties and a more defined timetable for the investigation. Some of these concerns were addressed in the 1998 Supplemental Agreement.

On March 15, 1999, more than two years after the Justice Department made its formal request, the European Commission announced that it had issued a Statement of Objections against

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<sup>114</sup> U.S. Department of Justice Computer Reservation Press Release at 2.

<sup>115</sup> *Id.* at 3.

<sup>116</sup> *Id.*

<sup>117</sup> David Lawsky, Reuters, *U.S. Seeks International Pacts to Guard Against Price Fixing*, ROCKY MOUNTAIN NEWS, October 5, 1997, at 14A.



Air France for possible abuse of its dominant position as a national carrier to foreclose competition in the CRS industry. Although the Statement of Objections has not been made public, the EC's press release asserts that Air France favored Amadeus, "having provided Amadeus with more accurate information and on a more timely basis than it did to other CRSs, thereby putting the latter at a competitive disadvantage."<sup>118</sup> The release further noted that pursuant to the provisions outlined in the U.S.-EC Agreement, the Commission maintained regular contact with the Antitrust Division and "kept the DOJ closely informed on its analysis and on the progress of the procedure."<sup>119</sup>

In accordance with EC procedure, the Statement of Objections does not represent any final determination on the part of the Commission. Air France has an opportunity to respond prior to final action by the Commission. Furthermore, as Assistant Attorney General Klein has observed, since the issuance of the Statement of Objections Sabre has entered into private settlements with two additional European airlines that will allow for enhanced access to essential data on the European markets.<sup>120</sup> It is important to an evaluation of positive comity's effectiveness at this stage to note that of the companies whose practices were identified by the U.S., the Statement of Objections is directed only at Air France, and this preliminary action was not taken until some twenty-six months after the referral.

### *Informal Applications*

While the positive comity provisions encompassed in current bilateral agreements have resulted in only one formal referral thus far, competition enforcement officials have publicly endorsed several informal referrals. In these instances, a country may informally request that another country investigate potentially anticompetitive practices occurring within its borders. One of the most widely publicized informal positive comity referrals involves the retail sales tracking industry. The Antitrust Division had been investigating possible anticompetitive practices by AC Nielsen Co. in the way it tied the terms of service contracts for its multinational accounts in one country to its contracts in other countries. When it became known that the European Commission also was conducting an investigation of the same conduct, the Department of Justice allowed the EC to take the lead in the investigation since the majority of the disputed conduct occurred in Europe. The Antitrust Division eventually terminated its investigation when the EC and AC Nielsen entered into an agreement to resolve the charges that also satisfied the Division's concerns. Both the U.S. and the EC publicly heralded this level of cooperation not only as an example of conditional deference of jurisdiction to the party most closely connected to the conduct, but also for the high level of cooperation between the parties, who were permitted to exchange confidential information

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<sup>118</sup> European Commission Press Release, "Commission Opens Procedure Against Air France for Favours Amadeus Reservation System," (Mar. 15, 1999).

<sup>119</sup> *Id.*

<sup>120</sup> Testimony of Assistant Attorney General Joel Klein, Antitrust Division, U.S. Department of Justice, Before the Senate Judiciary Committee, Antitrust, Business Rights and Competition Subcommittee (May 4, 1999) at 12.

pursuant to a waiver and closely coordinated the legal theories of the case.<sup>121</sup> This instance, together with several others, confirms that bilateral agreements support enhanced cooperation on many different levels and calls into question those commentators who may assess the benefits derived from positive comity solely on the experiences gleaned from the single formal referral lodged to date.

### **Assessments of Positive Comity**

The positive comity concept has ardent supporters as well as some skeptics. Upon signing the 1991 Agreement, both the EC and the United States openly extolled its benefits, calling it “innovative” and “an important first step” toward increased antitrust cooperation.<sup>122</sup> The authors of the Agreement said the Article V provisions would deter not only conflicts over jurisdiction, but also would “be an important step toward minimizing disputes over the extraterritorial application of the antitrust laws.”<sup>123</sup> Even then, however, some commentators were questioning its likely effectiveness. One concern revolved around inherent national interests that directly conflict with the practical application of positive comity. As one commentator noted, the principle of positive comity cannot be expected to alter the fundamental “proposition that laws are written and enforced to protect national interests.”<sup>124</sup>

After nine years and the experience derived from both formal and informal applications, the public officials appear to have tempered their enthusiasm. While it is apparent that government representatives still maintain visible support for positive comity, the emphasis now has shifted to the “limited role” it can achieve in international cooperation. FTC Chairman Robert Pitofsky recently noted that positive comity is “a small and modest element that you use in unusual cases to try to protect American firms doing business abroad or foreign firms doing business in the United States. It’s hardly a common resort.”<sup>125</sup> This shift in public declarations seems to have emanated from practical experience with the concept. While U.S. government officials appear not to have relinquished their belief that positive comity holds the potential to minimize international conflicts

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<sup>121</sup> U.S. Department of Justice Press Release, “Justice Department Closes Investigation Into the Way AC Nielsen Co. Contracts its Services for Tracking Retail Sales,” (Dec. 3, 1996); European Commission Press Release, “Following an Undertaking by AC Nielsen to Change its Contractual Practices, the European Commission Suspends its Action for Breach of the Competition Rules,” (Dec. 4, 1996).

<sup>122</sup> See *U.S., EC Commission Forge Antitrust Cooperation Accord*, 61 *Antitrust & Trade Reg. Rep.* 375 (Sept. 26, 1991).

<sup>123</sup> Statement by James F. Rill, then-Assistant Attorney General, Antitrust Division, U.S. Department of Justice, U.S. Department of Justice Press Release, “U.S. and Commission of European Communities Sign Antitrust Cooperation Agreement,” (Sept. 23, 1991) at 2.

<sup>124</sup> James R. Atwood, *Positive Comity -- Is It A Positive Step?*, 1992 *FORDHAM CORP. L. INST.* 79, 87 (B. Hawk, ed. 1993).

<sup>125</sup> Transcript of Testimony of Federal Trade Commission Chairman Robert Pitofsky before the Senate Judiciary Committee, Antitrust, Business Rights and Competition Subcommittee (May 4, 1999).



and enhance enforcement efforts against market access barriers, the scope of its applicability, at least in the current environment, has been drawn more narrowly.

Similarly, some foreign officials publicly have lowered their expectations for the role that positive comity can play in international antitrust cooperation. EC Competition Director Schaub said in January 1999 that the concept of positive comity had been “oversold” at its inception.<sup>126</sup> Despite statements of this kind, however, officials of foreign government have clearly voiced their continued support for positive comity and, in some instances, are pressing for expansion of positive comity agreements. At hearings before the Advisory Committee in November 1998, then-EC Competition Commissioner Van Miert noted that recent experiences with positive comity had led to efforts to improve the process. While positive comity itself should not always be the first approach taken, Van Miert said, it “should be part and parcel nevertheless of a global approach.”<sup>127</sup> Canada’s Director of Investigation and Research in the Competition Bureau, Dr. Konrad von Finckenstein, commended the 1998 Supplemental Agreement between the United States and the EC and urged Canada and the United States to work to expand their current agreement to include provisions similar to those contained in the U.S.-EC Agreements.<sup>128</sup> The OECD expressed similar support in a report issued in June 1999. The report noted that even though the ultimate viability of positive comity has yet to be determined, no apparent risks were associated with using the positive comity mechanism, and significant benefits were apparent in specific instances.<sup>129</sup> The OECD recommends its Member nations continue to support such forms of voluntary cooperation.

The discussion and debate centered around positive comity has extended far beyond the reaches of antitrust enforcement officials. The Advisory Committee heard from various commentators during its series of hearings and meetings regarding the viability and effectiveness of positive comity. The business community generally has expressed its support for the positive comity mechanism. In statements before the Advisory Committee, both the U.S. Council for International Business and the Business Roundtable noted that the principles of positive comity help to alleviate potential international tensions while also providing “a sensible, systematic approach to fact-gathering, reporting, and bilateral consultation among competition authorities.”<sup>130</sup> Both

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<sup>126</sup> In remarks at the American Bar Association Section of Antitrust Law Advanced International Antitrust Workshop, January 14, 1999, Schaub also expressed concern regarding the appearance of political interference in the positive comity process, hence raising the possibility that countries may choose to avoid the complications of such interference by not pursuing a referral.

<sup>127</sup> Testimony of Karel Van Miert, then-EC Competition Commissioner, ICPAC Hearings (Nov. 2, 1998), Hearings Transcript at 48.

<sup>128</sup> Testimony of Konrad von Finckenstein, Director of Investigation and Research, Canada Bureau of Competition, ICPAC Hearings (Nov. 2, 1998), Hearings Transcript at 36.

<sup>129</sup> OECD REPORT ON POSITIVE COMITY at 16.

<sup>130</sup> Business Roundtable Submission at 5; *see also* USCIB Submission at 3.

organizations also cautioned the United States to retain its authority to pursue extraterritorial enforcement of domestic antitrust laws when the application of positive comity is not feasible or does not have satisfactory results. Despite a significant level of confidence in current positive comity agreements, several commentators representing business expressed concern regarding the application of positive comity principles in an agreement with Japan. In the words of a spokesperson for the National Association of Manufacturers, “such an agreement would . . . not be advisable until the JFTC acts to resolve [several] outstanding competition issues in a manner that is both transparent and credible.”<sup>131</sup>

### **The Advisory Committee’s Assessment of Positive Comity**

Taking into full consideration any shortcomings in the positive comity approach, some of which are attributable to the novelty of application and thus are correctable, the Advisory Committee believes that positive comity remains at the least a useful first step in addressing anticompetitive restraints affecting trade where the territorial party has the authority and the willingness to take effective action.<sup>132</sup> The benefits associated with the positive comity process hold the potential for enhanced cooperation and minimization of conflicts that can arise during cross-border investigations of conduct affecting market access. By requesting that the territorial party assume responsibility for determining whether an investigation into disputed conduct is warranted and for pursuing ways to remedy the conduct if justified, the need for extraterritorial enforcement can be diminished in some specific circumstances. Thus, the application of positive comity can permit the resolution of at least some conflicts in a cooperative manner that is consistent with sovereignty considerations.

A significant hurdle in extraterritorial enforcement lies in the considerable difficulty encountered during the discovery process. Attempts to obtain access to necessary documents, evidence, and potential witnesses, all of which may be located outside the borders of the investigating jurisdiction, can prove to be an insurmountable obstacle or, at the very least, a barrier to effective and timely enforcement.<sup>133</sup> By requesting that the territorial party pursue the investigation, chances of successful prosecution of the case improve because the territorial party maintains significant advantage in securing necessary documents and witnesses to aid in the investigation of the alleged conduct. Furthermore, the extraterritorial application of domestic laws can result in the inability to secure the necessary remedies to resolve the anticompetitive practices.

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<sup>131</sup> See NAM Submission at 7 (Apr. 22, 1999); see also Submission by Guardian Industries Corp., “Barriers to Entry Into the Japanese Flat Glass Market: Opportunities for Bilateral Cooperation,” ICPAC Hearings (May 17, 1999) at 14; Padilla ICPAC Spring Hearings Testimony at 112-13.

<sup>132</sup> See *U.S. Broadens Enforcement Posture on Foreign Application of Sherman Act*, 62 Antitrust & Trade Reg. Rep. 479 (Apr. 9, 1992) (discussion regarding the DOJ’s rescission of Footnote 159 in the 1988 International Guidelines).

<sup>133</sup> For example, the inability to secure necessary documents and witnesses apparently contributed to the Department of Justice’s failed prosecution attempt in the GE/DeBeer’s price-fixing case. See Joel I. Klein, then-Acting Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Criminal Enforcement in a Globalized Economy, Address before the Advanced Criminal Antitrust Workshop, Phoenix, AZ (Feb. 20, 1997).



When the territorial party assumes responsibility for the investigation and potential enforcement actions, such requisite remedies are within the jurisdictional scope and reach of the territorial party.

In addition to these tangible benefits, some have recognized that bilateral accords containing provisions such as positive comity may promote or facilitate increased convergence of domestic antitrust laws between both parties to the agreement.<sup>134</sup> As cooperation on any level—formal or informal — increases, jurisdictions become more cognizant of the laws and policies of other jurisdictions. Such awareness potentially could lead to enhanced mutual recognition of the antitrust laws of each party involved in the cooperative efforts and, therefore, potentially minimize the possibility of divergent outcomes from any investigation.

The OECD has noted that an attempt at positive comity through a referral does not, in itself, entail any substantial risks.<sup>135</sup> The initial pursuit of the resolution of anticompetitive practices through the positive comity channel does not eliminate any future options, including extraterritorial enforcement of domestic antitrust laws if positive comity does not resolve the disputed practices appropriately. It is significant, however, that in some instances, the time delay associated with a positive comity referral that does not satisfy the concerns of the requesting party may affect consumers or competitors adversely. Nevertheless, the array of benefits associated with an attempt at positive comity merits its application as a first step in appropriate situations, taking into account the explicit retention of all prosecutorial discretion as noted in current positive comity agreements.

Although the benefits derived from positive comity are clear, the Advisory Committee recognizes that the current climate and prior experiences illustrate several shortcomings that need to be addressed if positive comity is to become a fully effective element of international cooperative efforts. First, the historic enforcement record of worldwide antitrust agencies does not promote unqualified confidence in the willingness of antitrust authorities to pursue action against domestic firms that impair the ability of foreign firms to compete, despite possible domestic consumer harm. In the absence of a nation's serious commitment to take such actions, the benefits of positive comity may remain modest or illusory.

Delay following a referral to another jurisdiction to investigate alleged violations also remains a significant obstacle to effective and timely resolution of cases. As illustrated by the one formal referral to date, more than two years elapsed between the time the territorial party was asked to initiate an investigation and the time the territorial party issued an official statement on its progress. As one member of Congress said during congressional hearings, the current situation

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<sup>134</sup> Mitsuo Matsushita, *United States-Japan Trade Issues and a Possible Bilateral Antitrust Agreement Between the United States and Japan*, 16 ARIZ. J. INT'L & COMP. LAW 249, 253 (Winter 1999).

<sup>135</sup> OECD Report on Positive Comity at 14.

where a referral is “started reluctantly, staffed inadequately, and dragged out interminably . . . is clearly unacceptable” as a means to resolve potentially damaging private restraints of trade.<sup>136</sup>

Any delay in the investigatory process by the territorial party is magnified when a lack of transparency exists in the process. Uncertainty about whether an adequate or appropriate investigation is occurring engenders doubt on the part of the affected party and strengthens any tendency toward pursuing extraterritorial enforcement. Confidence and trust remain preeminent components of effective cooperation through positive comity channels. Transparency in the entire investigatory and procedural process promotes increased assurance that the affected party’s concerns are being addressed in a manner consistent with the premise of the bilateral accord.

To be truly effective, positive comity also requires fundamental symmetry between the parties’ antitrust laws and enforcement commitment.<sup>137</sup> Without confidence in the authority and effectiveness of the parties’ competition agencies and a requisite level of similarity in domestic antitrust laws,<sup>138</sup> the possibility for a multitude of bilateral positive comity agreements in today’s international environment is not feasible.

Finally, the application of positive comity remains a viable option only for market access or restraint of trade cases. Statutory timing issues make positive comity infeasible for merger cases. Thus, while positive comity holds the potential to make a contribution in international antitrust cooperation, it should not be viewed as a singular vehicle for enforcement of cross-border antitrust violations of all forms.

### **The Advisory Committee’s Recommendations for Strengthening Positive Comity**

Certain improvements in the positive comity process could be implemented to promote a more effective mechanism for addressing cross-border market access violations. These modifications should aim to provide a heightened degree of confidence in the process for both jurisdictions and the restrained private parties.

At congressional hearings held in October 1998 on the effectiveness of positive comity, a representative from Sabre, the only private complainant involved in a formal referral to date, put

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<sup>136</sup> See Statement of Senator Mike DeWine, Before the U.S. Senate Judiciary Antitrust, Business Rights and Competition Subcommittee (October 2, 1998).

<sup>137</sup> See Testimony of Mitsuo Matsushita, Professor, Seikei University, ICPAC Hearings (Nov. 4, 1998) Hearings Transcript at 97.

<sup>138</sup> See Merit E. Janow, *A Look at U.S.-EU Cooperation in Competition Policy*, in STRENGTHENING TRANSATLANTIC COOPERATION ON COMPETITION POLICY (Evenett, Lehmann, and Steil, eds., forthcoming) (“positive comity is unlikely to prove to be an antidote to those market access cases that reflect conflicting national policies or where there are substantial differences in law”).



forth a number of recommendations to improve the procedural elements of the process.<sup>139</sup> FTC Chairman Pitofsky subsequently endorsed the essence of these recommendations. The Advisory Committee supports some of the proposals which were advanced by Sabre, including the following: provision of a realistic assessment at the outset of an investigation whether the requested party can devote adequate resources to the investigation; dissemination of status updates from the affected party to the private party whose complaint is at issue to the degree permissible under domestic law and practice; and establishment of a timetable to the extent possible for processing the referral. The central purpose behind these suggestions is to ensure that the referred jurisdiction pursue a case vigorously and provide at least as much information to involved private parties and the referring jurisdiction as would occur in a domestic investigation.

The Advisory Committee recognizes that future experience with positive comity in actual referrals might induce additional refinements in the process. Such additional modifications might usefully include the right of the restrained private party to participate in the process, at least to the extent permitted under its domestic laws; a commitment by the territorial party to use its discovery powers to the fullest extent; and timely advice to the restrained private party regarding the focus and substance of information needed to support its complaint.

Confidence in the application of positive comity principles is essential to ensure its effectiveness and success. By instituting measures to increase communication and transparency in a positive comity referral, such as those outlined above, the Advisory Committee hopes that the procedural components of a formal referral will further enhance international cooperation.

In addition to visible support for positive comity by competition enforcement agencies, international organizations that address trade and competition issues also should endorse positive comity in their mission. By “advertising” the advantages reaped from effective positive comity cooperation, international organizations hold the potential to expand such cooperation to jurisdictions that have similar antitrust laws and enforcement policies.

The OECD has played an important role in demonstrating the merits of international cooperation. In addition to incorporating provisions related to positive comity in its recommendations on trade and competition, the OECD recently published a report expressing support for the principles of positive comity and concluding that positive comity “has significant potential benefits in a limited number of situations [and] smaller benefits in a wider range of cases.”<sup>140</sup> Such an endorsement can steer countries toward the establishment of bilateral agreements and the use of cooperation as a mechanism for combating private restraints blocking access to foreign markets.

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<sup>139</sup> Prepared Testimony of Andrew B. Steinberg, Senior Vice President, General Counsel and Corporate Secretary, The Sabre Group, Inc., Before the Senate Judiciary Antitrust, Business Rights, and Competition Subcommittee (Oct. 2, 1998).

<sup>140</sup> OECD REPORT ON POSITIVE COMITY at 16.

As set forth in the 1998 U.S.-EC Agreement, positive comity appears to be a useful course of action for pursuing some types of market access cases. The Advisory Committee recognizes its importance as a vehicle for minimizing conflict and enhancing enforcement of law in market access violations. Positive comity, however, can succeed only if the international antitrust community maintains a full understanding of its ultimate goals and potential. It is imperative that both parties to an agreement set realistic goals for what positive comity can and cannot accomplish. As Assistant Attorney General Klein recently noted, “positive comity is not a quick and easy panacea for all antitrust-related trade problems.”<sup>141</sup> Indeed, positive comity is not a replacement for the aggrieved jurisdiction’s option to enforce its laws. Since positive comity remains an option in a limited number of instances, it should be used as one tool within the entire framework of options available to antitrust enforcement officials (e.g., both unilateral and an expanded array of multilateral initiatives).

In summary, positive comity should be used in a manner that develops its potential and prevents it from being perceived as either an idealistic objective or a vacuous policy tool. This will, of course, be driven by actual cases. Recently, the United States entered into a number of bilateral antitrust cooperation agreements that contain positive comity features.<sup>142</sup> It is the hope of this Advisory Committee that a conscientious effort will be made to implement and test those agreements as a first response to solve real problems, when meritorious cases arise.<sup>143</sup>

### **U.S. ENFORCEMENT TO GAIN MARKET ACCESS**

At the Advisory Committee hearings in the Spring of 1999, representatives from several business organizations argued that the United States should use its antitrust tools more robustly to remedy foreign restraints on market access experienced by U.S. firms. For example, one trade association recommended that U.S. antitrust laws be amended to clarify “their application to conduct outside the United States which hinders access to U.S. markets” and that “U.S. enforcers could work with U.S. agencies responsible for compliance with existing trade agreements to determine whether

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<sup>141</sup> Joel I. Klein, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, *A Reality Check on Antitrust Rules in the World Trade Organization, and a Practical Way Forward on International Antitrust* 6, Address before the OECD Conference on Trade and Competition (June 30, 1999).

<sup>142</sup> See previous discussion above for a list of those jurisdictions with whom the United States has entered into agreements containing positive comity provisions.

<sup>143</sup> Advisory Committee Member Eleanor M. Fox would hesitate to put any burdens on a sister competition agency to report to an “affected” private party. When a requesting government asks a territorial agency to investigate a possible violation, it should make the request in the public interest, not private interest. Normally, the public interest will lie in opening a market for world competition, not for a particular American firm. Apart from the problem of requesting authorities’ aligning their interests with complaining competitors, requested authorities have good reason to be jealous of their own priority setting in view of their limited resources.



conduct that constitutes non-compliance with such agreements amounts to an antitrust violation.”<sup>144</sup> Another business organization urged U.S. authorities to “continue to exercise extraterritorial antitrust jurisdiction where foreign relief is not forthcoming, substantive violations are presented, the standards for U.S. jurisdiction are met, and effective relief can be obtained.”<sup>145</sup> Another suggested that “the United States antitrust enforcement agencies must aggressively investigate and prosecute persistent anticompetitive conduct abroad,” and “the U.S. should consider forging new tools if those at our disposal prove to be inadequate.”<sup>146</sup>

Extraterritorial antitrust enforcement is one of the approaches available to the United States to remedy anticompetitive conduct that deters U.S. firms from entering or expanding their operations in foreign markets. This section examines the record in an effort to assess, first, when the use of extraterritorial enforcement is appropriate or feasible, and second, what changes, if any, might be made in the process to make it a more effective tool.

### **The U.S. Government’s Extraterritorial Enforcement Policy**

Justice Department policy has varied in its approach to conduct abroad that restrains U.S. export commerce. In its 1977 Antitrust Guide for International Operations, the Antitrust Division stated that a major purpose of its effort was “to protect American export and investment opportunities against privately imposed restrictions. The concern is that each U.S.-based firm engaged in the export of goods, services, or capital should be allowed to compete and not be shut out by some restriction introduced by a bigger or less principled competitor.”<sup>147</sup> This reflected the concern in the guidelines with competitor opportunities. In the 1980s, the DOJ rejected this concern and imported the consumer welfare paradigm into the international arena as well as domestic law. In 1988, the DOJ stated that as a matter of prosecutorial discretion, it would pursue enforcement actions against only those export restraints that harmed U.S. consumers and not those that only harmed U.S. exports. The 1988 Antitrust Enforcement Guidelines for International Operations included a footnote 159 which stated:

Although the FTAIA [Foreign Trade Antitrust Improvements Act] extends jurisdiction under the Sherman Act to conduct that has a direct, substantial and reasonably foreseeable effect on the export trade or export commerce of a person engaged in such commerce in the United States, the Department is concerned only

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<sup>144</sup> American Forest and Paper Submission at p. 5.

<sup>145</sup> Business Roundtable Submission at 5.

<sup>146</sup> Farrar ICPAC Spring Hearings Testimony at 119, 125.

<sup>147</sup> U.S. DEPARTMENT OF JUSTICE, ANTITRUST DIVISION, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS 5 (1977).

with adverse effects on competition that would harm U.S. consumers by reducing output or raising prices.<sup>148</sup>

In 1992 the Antitrust Division deleted footnote 159, stating that “Congress did not intend the antitrust laws to be limited to cases based on direct harm to consumers. Today, when both imports and exports are of importance to [the U.S.] economy, we would not limit our concern to competition in only half our trade.”<sup>149</sup> This policy was later incorporated into the 1995 guidelines, which state that “the Agencies may, in appropriate cases, take enforcement action against anticompetitive conduct, wherever occurring, that restrains U.S. exports, if (1) the conduct has a direct, substantial and reasonably foreseeable effect on exports of goods or services from the United States, and (2) the U.S. courts can obtain jurisdiction over persons or corporations engaged in such conduct.”<sup>150</sup>

The guidelines also state that the Department of Justice and the Federal Trade Commission “have agreed to consider the legitimate interests of other nations in accordance with the recommendations of the OECD and various bilateral agreements.”<sup>151</sup> A number of factors that the antitrust agencies consider are itemized in those guidelines.<sup>152</sup>

In addition, the enforcement guidelines say that the Department of Justice, as a matter of prosecutorial discretion, would take “full account of comity beyond whether there is a conflict with foreign law.”<sup>153</sup> As part of a traditional comity analysis, the agencies would consider “whether one

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<sup>148</sup> U.S. DEPARTMENT OF JUSTICE, ANTITRUST DIVISION, ANTITRUST GUIDELINES FOR INTERNATIONAL OPERATIONS, 30, n. 159 (1988).

<sup>149</sup> U.S. Department of Justice Press Release 92-117, “Justice Department Will Challenge Foreign Restraints on U.S. Exports Under Antitrust Laws” (Apr. 3, 1992), p. 2.

<sup>150</sup> U.S. DEPARTMENT OF JUSTICE/FEDERAL TRADE COMMISSION, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS 16 (1995)[hereinafter 1995 DOJ/FTC INTERNATIONAL GUIDELINES].

<sup>151</sup> 1995 DOJ/FTC INTERNATIONAL GUIDELINES at 20, n. 73.

<sup>152</sup> *Id.* at p. 21, n. 74. These include: The relative significance to the alleged violation of conduct within the United States, as compared to conduct abroad; the nationality of the persons involved in or affected by the conduct; the presence or absence of a purpose to affect U.S. consumers, markets or exporters; the relative significance and foreseeability of the effects of the conduct on the United States as compared to the effects abroad, the existence of reasonable expectations that would be furthered or defeated by the action; the degree of conflict with foreign law or articulated foreign economic policies; the extent to which the enforcement activities of another country with respect to the same persons, including remedies resulting from those activities may be affected; and the effectiveness of foreign enforcement as compared to U.S. enforcement action. The first six of these factors are based on previous international guidelines. The seventh and eighth factors are derived from considerations in the 1991 U.S.-EC Antitrust Cooperation Agreement.

<sup>153</sup> As earlier, the term “comity” refers to the general principle that a country should take other countries’ important interests into account in its law enforcement in return for their doing the same. Traditional comity has been defined as the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws. There is currently a debate as to whether the guidelines go beyond the



country encourages a certain course of conduct, leaves parties free to choose among different strategies, or prohibits some of those strategies. In addition, the Agencies [would] take into account the effect of their enforcement activities on related enforcement activities of a foreign antitrust authority.”<sup>154</sup> Taking a controversial position among legal commentators, the Justice Department has stated that it “does not believe that it is the role of the courts to ‘second-guess’ the executive branch’s judgment as to the proper role of comity concerns under these circumstances.”<sup>155</sup> These comments suggest that at least as a matter of stated policy, the Department of Justice remains committed to pursue foreign restraints that harm U.S. exports, but would do so only after considering how foreign governments might react to U.S. actions.

### *The Government Case Record*

The Advisory Committee has examined the record of antitrust cases filed by the United States and identified 44 cases since 1912 in which the United States claimed that defendants were engaged in conduct that restrained U.S. exports abroad.<sup>156</sup> An analysis of the case record does not manifest a clear pattern of antitrust enforcement actions regarding export restraints. The cases deal with several types of practices, including allegations of anticompetitive conduct that also affects U.S. domestic commerce.<sup>157</sup> Indeed, many of the cases include a combination of U.S. and foreign companies acting in concert to limit competition in a particular industry. For example, two cases from the 1950s demonstrate how enforcement actions against export restraints were designed to

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requirements under U.S. law. For a discussion of the uncertain status of comity considerations in major U.S. cases such as *Hartford Fire*, see Appendix A to Chapter 1. See also Spencer Weber Waller, *From the Ashes of Hartford Fire: The Unanswered Questions of Comity*, Paper delivered to the Twenty-Fifth Anniversary Conference on International Antitrust Law & Policy, Fordham Corporate Law Institute (Oct. 22-23, 1998).

<sup>154</sup> 1995 DOJ/FTC INTERNATIONAL GUIDELINES at 20.

<sup>155</sup> *Id.* at 21-22 citing *United States v. Baker Hughes, Inc.*, 731 F.Supp. 3, 6, n.5 (D.D.C. 1990), *aff’d*, 908 F.2d 981 (D.C. Cir. 1990). Some legal commentators take issue with the Justice Department’s position and have argued that the Executive Branch decision to sue is subject to final review by the courts. See e.g., AMERICAN BAR ASSOCIATION, SECTION OF ANTITRUST LAW, REPORT OF THE SPECIAL COMMITTEE ON INTERNATIONAL ANTITRUST 164 (September 1, 1991).

<sup>156</sup> See Antitrust Cases Filed by the U.S. Involving Export Restraint Allegations, Memorandum prepared by ICPAC Staff for the December 16, 1998 Advisory Committee meeting. This memorandum does not purport to be an exhaustive survey of U.S. antitrust enforcement actions.

<sup>157</sup> See e.g., *United States v. General Electric Co.*, 1962 Trade Cas. (CCH) ¶¶ 70342; 70546 (S.D.N.Y. 1962).

break up international cartels, rather than ensure U.S. firms market access.<sup>158</sup> The Advisory Committee was able to find only five cases since 1978 that involved export restraint allegations.<sup>159</sup>

Thus, the record of U.S. government antitrust enforcement against foreign restraints that bar market access by U.S. firms is limited. Although some have generously viewed this record as indicating that enforcement is “not infrequent,”<sup>160</sup> unilateral government enforcement cannot be considered to have played a major role in opening foreign markets. Many of the early cases address international cartels with U.S. members or conspiracies by U.S. firms with foreign firms or subsidiaries to restrain competition. The record has not produced antitrust enforcement cases directed at the prototypical market access problem: where non-U.S. private firms or firms located outside the United States, perhaps with the support of the host government, engage in anticompetitive conduct that restricts exports to that market and inhibits access by U.S. firms.

There are several possible explanations for this record. First, while the U.S. Department of Justice has expressed a willingness to use its antitrust laws to reach foreign anticompetitive arrangements that harm U.S. exports, the difficulties of establishing jurisdiction, overcoming potential objections to offshore discovery, conducting the investigation, establishing proof, and enforcing any remedy can all act as practical barriers to bringing such cases. U.S. officials may not have considered export restraints to be a priority in some years; certainly few cases with that profile appear to have been brought to the attention of U.S. enforcers. It is not publicly known how many, if any, firms have discussed antitrust problems in foreign markets with the Justice Department or sought official action by the Antitrust Division. It is curious that only a few such instances, even anecdotal, have surfaced in the press. Firms may be discouraged from bringing their problems in foreign markets to the Department of Justice because of the difficulties in developing evidence to prove a case in a court of law or because they have decided that the benefits of such litigation are too uncertain to justify the expense. It is also conceivable that some U.S. officials have been reluctant to pursue such cases because they have not wanted to antagonize their foreign counterparts without a strong case.

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<sup>158</sup> *United States v. Timken Roller Bearing Co.*, 83 F. Supp. 284 (N.D. Ohio 1949), Modified 341 U.S. 593, 71 S. Ct. 971 (1951). *United States v. Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947 (D. Mass 1950), amended, 96 F. Supp. 356 (D. Mass. 1951). For a further description of these cases, see Annex 5-A.

<sup>159</sup> *United States v. Westinghouse Electric Corp.*, 471 F.Supp. 532 (N.D. Cal 1978), *affirmed in part, reversed in part*, 648 F.2d 642 (9<sup>th</sup> Cir. 1981); *United States v. Gulf Oil Corp.*, [U.S. Antitrust Cases, Summaries, Complaints, Indictments, Developments 1970-79 Transfer Binder] Trade Reg. Rep. (CCH) ¶45,078 at 53,722-23 (W.D. Pa. 1978); *United States v. Bechtel Corp.*, 1979-1 Trade Cas. (CCH) ¶¶62,649, 62,430 (N.D. Cal. 1979), *affirmed*, 648 F.2d 660 (9<sup>th</sup> Cir.), *cert. denied*, 454 U.S. 1083 (1981); *United States v. C. Itoh & Co., Ltd.*, 1982-3 Trade Cas. (CCH) ¶65,010 (W.D. Wash 1982); *United States v. Pilkington PLC*, 1994-2 Trade Cas. (CCH) ¶70,842 (D.Ariz 1994). For a further description, see Annex 5-A.

<sup>160</sup> See Wilkie Farr & Gallagher, “Liberalizing Trade Through Competition Policy: Cooperation or Conflict,” (March 1999) at 17, submitted for inclusion in the Advisory Committee record.



Finally, some complainants may have turned to trade laws to try and settle their grievances, rather than antitrust laws. In cases where either antitrust or trade law might apply, complainants may have found formal or informal trade policy instruments to be a more attractive option than antitrust tools because trade officials are more accustomed to using public jawboning and pressure to try to induce foreign governments to undertake corrective measures. Antitrust officials have generally been much more circumscribed with respect to their public statements about possible enforcement matters.

### **Private Enforcement Record**

The Advisory Committee has also considered the extent to which private litigation can serve as a meaningful tool to open markets. Two private antitrust cases reviewed by the Supreme Court, *Continental Ore Co. v. Union Carbide and Carbon Corp* and *Zenith Radio Corporation v. Hazeltine Research Inc.* have delineated the reach of the antitrust laws against export restraints.<sup>161</sup>

To aid its inquiry into the utility of private litigation as a means of enhancing market access, the Advisory Committee invited the Section of Antitrust Law of the American Bar Association to prepare a submission discussing this issue. The resulting paper noted that the total number of private antitrust cases had declined dramatically from 1978 to 1998.<sup>162</sup> The paper also pointed out that private antitrust litigation against export restraints faces many of the same difficulties as governmental enforcement.<sup>163</sup> Obstacles to obtaining jurisdiction, gathering evidence and developing effective remedies all exist in private export restraint litigation.

Besides the hurdles inherent in litigation, whether public or private, tackling foreign-based restraints that bar access or sales through private antitrust litigation poses additional problems. First, while the U.S. Department of Justice considers principles of comity before considering whether to bring an enforcement action, private parties are not bound by such strictures. U.S. law gives little guidance to governments and international business executives where U.S. competition policy comes into direct conflict with the competition policy of foreign governments.<sup>164</sup> Thus, the Advisory Committee believes that significant improvements should be sought in the process and standards by which competing interests are balanced for comity purposes or otherwise. Moreover, federal, state and local judges hearing private disputes that raise claims or defenses based on considerations of

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<sup>161</sup> *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962); *Zenith Radio Corporation v. Hazeltine Research Inc.*, 395 U.S. 100 (1969). For a description of these cases, see Annex 5-A.

<sup>162</sup> The Report also notes that despite this overall decline “private international antitrust litigation continues to grow.” ABA Antitrust Section Private Litigation Submission at 4, 22.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 22.

governmental policy should invite concerned governments at an early stage in the litigation to submit their views, which commonly takes the form of *amicus curiae* submission.

Second, the previously dormant application of the doctrine of *forum non conveniens* in antitrust litigation may be revived. This doctrine applies when another forum has superior contacts with the subject matter of the litigation and is better able to conduct the litigation.<sup>165</sup> Until recently, few nations had competition law systems sophisticated enough to offer litigants antitrust remedies and many nations opposed private rights of action. Thus, U.S. courts were unwilling to use the doctrine to dismiss transnational antitrust cases.<sup>166</sup> Recently, however, a U.S. court applied the doctrine to dismiss a private antitrust claim. In *Capital Currency Exchange, N.V. v. National Westminster Bank PLC*, the court ruled that the English courts, which are bound to enforce competition provisions of the Treaty of Rome, provided for a more convenient alternative forum to resolve a private antitrust dispute because the conduct was alleged to have taken place in England and most witnesses and documents were located there.<sup>167</sup> As other nations develop more sophisticated competition law structures, the doctrine of *forum non conveniens* may play a greater role in private international antitrust litigation.

An additional problem concerns the private treble damage remedy in private antitrust cases. As the ABA Working Group notes, a private defendant who is found to have violated the U.S. antitrust laws can be subject to automatic treble damage liability with the potential for enormous judgments.<sup>168</sup> Concerns abroad about the U.S. treble damage remedies have led to the passage of “clawback” statutes, such as that in the United Kingdom, which allow a national to file a suit in a local court to recover damages from the successful U.S. plaintiff paid in excess of compensatory amounts in connection with a foreign action for multiple damages.<sup>169</sup> For these reasons and others, one business group has urged that “the U.S. Government needs to intensify its efforts to enhance the rights of parties attempting to enforce judgments in antitrust actions.”<sup>170</sup> Finally, given the

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<sup>165</sup> 28 U.S.C.A. § 1404(a).

<sup>166</sup> See e.g., *Industrial Investment Development Corp. v. Mitsui & Co.*, 671 F.2d 876 (5<sup>th</sup> Cir. 1982) (Defendants cannot use the rules of *forum non conveniens* as a substitute for the rules concerning the extraterritorial application of the Sherman act).

<sup>167</sup> *Capital Currency Exchange, N.V. v. National Westminster Bank PLC*, 96 Civ. 6465 (S.D.N.Y. 1997), *aff'd* 155 F.3d 603 (2d Cir. 1998). But see *Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922 (2d Cir. 1998) (Second Circuit decided antitrust issues despite parallel action in French courts finding that “it remains unsettled in France what conduct is permissible on the part of France Telecom S.A. and Filetech S.A. . . .” 157 F.3d at 928).

<sup>168</sup> ABA Antitrust Section Working Group on Private Litigation Report at 23.

<sup>169</sup> United Kingdom, Protection of Trading Interest Act 1980, and Evidence (Proceedings in Other Jurisdictions) Act 1975. Reprinted in A.V. LOWE, EXTRATERRITORIAL JURISDICTION: AN ANNOTATED COLLECTION OF LEGAL MATERIALS (Grotius Pub. Ltd., London 1983), pp. 186-193.

<sup>170</sup> Business Roundtable Submission at 6-7.



difficulties of litigating a private export restraint case, the ability to bring a complaint under Section 301 of the U.S. trade laws may offer private parties an attractive alternative for addressing anticompetitive restraints, at least in those instances when the foreign government may have played some role in the perceived problem (see discussion of Section 301, below).

Thus, on the one hand private antitrust litigation of foreign-based restraints that hinder export commerce offers an opportunity for aggrieved firms to pursue their claims without relying on the enforcement choices of the U.S. Department of Justice. On the other hand, such suits can be difficult to pursue for all the same reasons as any litigation and can also lead to greater tensions with foreign nations that believe such suits violate notions of traditional comity or that object to U.S. treble damage remedies.

The private action treble damage remedy has been a particular source of tension between the United States and other nations. Many foreign jurisdictions chafe at the prospect of having their firms pay treble damages in another country's courts, particularly for conduct that may not even violate their own competition laws. In light of this considerable opposition, the Advisory Committee considered whether the United States should detreble, at least with respect to export restraint claims, and concluded that such action would not be appropriate. The U.S. private treble damage remedy plays a useful deterrent effect against anticompetitive conduct both at home and abroad.<sup>171</sup> U.S. antitrust law currently does not distinguish between foreign and domestic defendants. The removal of the treble damage remedy in these export restraint cases might result in fewer conflicts with foreign law, but it would also reward jurisdictions that have proven to be the most adamantly opposed to the offshore application of U.S. antitrust laws. Such an approach would result in foreign defendants gaining better treatment under U.S. law than U.S. defendants and could lead to protracted litigation over whether the offending conduct harmed "import" commerce or "export" commerce. Moreover, as the case record shows, such a distinction in claims may itself be very difficult to make; most of the cases that have had an export commerce claim have also claimed anticompetitive effects in the United States. As discussed in Chapter 4, the Advisory Committee concludes that the potential benefits from increased cooperation from foreign authorities and firms, notwithstanding, modifications of the treble damage remedy is not recommended.

### **Reactions from Abroad to Extraterritorial Enforcement**

The issue of treble damages aside, some governments have strongly resisted the extraterritorial application of the U.S. antitrust laws in general. A Canadian government official outlined the dilemma succinctly in the late 1970s: "Where a transnational antitrust issue is really a manifestation of a policy conflict between governments, it should be recognized that there may be no applicable international law to resolve the conflict. In such cases, resolution should be sought

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<sup>171</sup> Advisory Committee Member Eleanor M. Fox disagrees and believes that U.S. law does not reach contracts, combinations, or monopolization in another nation that block access to markets of that nation where the only geographically relevant market is abroad.

through the normal methods of consultation and negotiation. For one government to seek to resolve the conflict in its favor by invoking its national law before its domestic tribunals is not the rule of law but an application, in judicial guise, of the principle that economic might is right.”<sup>172</sup>

Several jurisdiction expressed similar sentiments in their comments on the Antitrust Division’s draft 1995 extraterritorial enforcement guidelines. The United Kingdom, for example, argued that “the Agencies assert that foreclosure of a foreign market or refusal to adopt U.S. technical standards is sufficient to establish the requisite effect. Such jurisdictional claims show U.S. antitrust law being used as an instrument of trade policy to open markets perceived as closed to U.S. exporters. The U.K. Government regards this as an objectionable and inappropriate use of antitrust powers.”<sup>173</sup> The EC’s comments noted the potentially harmful impact of U.S. extraterritorial enforcement on antitrust cooperation: “The Commission believes that the accent which the Guidelines lay on unilateral action by the U.S. authorities in fact contradicts on the one hand the commitment to take account of comity principles and on the other hand, the efforts of the U.S. authorities to strengthen international cooperation. . . .”<sup>174</sup>

U.S. officials and U.S. antitrust policy need to consider such complaints. Any decision to use the antitrust laws against restraints in foreign markets that restrict U.S. exports will need to take account of the potentially negative consequences to both U.S. foreign relations and U.S. efforts to enhance cooperation with other competition authorities.

### **Consideration of Proposals for Dealing with Anticompetitive Practices Abroad**

Some lawyers and business executives have called for more effective policy tools to open foreign markets, including proposals to involve the trade agencies in making determinations of market foreclosure stemming from anticompetitive practices abroad. For example, lawyers at the firm of Dewey Ballantine have argued that “traditional antitrust law quickly runs into limits where the hand of a foreign government intervenes, and when private practices are involved, there are serious problems of gathering evidence in a foreign jurisdiction.”<sup>175</sup> In addition, these lawyers argue that few foreign antitrust authorities can be relied upon to attack conduct that affects U.S. producers because very few foreign competition agencies are as effective as the Department of Justice or the Federal Trade Commission.

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<sup>172</sup> J.S. Stanford, *The Application of the Sherman Act to Conduct Outside the United States: A View from Abroad*, 11 CORNELL INT’L L.J. 195 (1978). See also Joseph P. Griffin, *Foreign Governmental Reactions to U.S. Assertion of Extraterritorial Jurisdiction*, 6 GEO. MASON L. REV. 505 (1998).

<sup>173</sup> Comments of the Government of the United Kingdom on the draft Antitrust Enforcement Guidelines for International Operations (December 19, 1994)

<sup>174</sup> Comments of the European Commission Services on the U.S. Antitrust Enforcement Guidelines for International Operations 1994 (February 9, 1995)

<sup>175</sup> Dewey Ballantine Submission at 4.



This perspective sees anticompetitive restraints abroad as barriers to market access and therefore the necessary response is enhanced unilateral trade remedies rather than enhanced antitrust tools. The Dewey Ballantine lawyers recommend that the Department of Commerce or other U.S. trade agency undertake an empirical inquiry into foreign market access restraints. A study of this kind could “(1) identify large markets where there are few or no imports; (2) identify where there are no exports from one major country to another; and (3) identify where persistent and dramatic price differentials exist between markets.”<sup>176</sup> Inferences from such data could then become the basis for the initiation of a trade policy response. The proposal advocates that Section 301 of the U.S. trade laws be amended to give the USTR or the Department of Commerce the authority to issue “cease and desist orders against those anticompetitive foreign practices that restrict U.S. commerce.”<sup>177</sup> The USTR would be provided with new authority to assess fines against private parties that refuse to desist from engaging in harmful anticompetitive practices.<sup>178</sup>

The Advisory Committee heard a similar proposal at its Spring 1999 hearings. A representative from the Eastman Kodak Co. recommended that the Advisory Committee consider a proposal to have an independent authority, such as the International Trade Commission, make a finding that foreign anticompetitive practices exist and are creating a barrier to U.S. commerce; such

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<sup>176</sup> *Id.* at p. 2 of Summary.

<sup>177</sup> *Id.* at 9. The Dewey Ballantine paper notes that this option was recommended by the Commission on United States-Pacific Trade and Investment. See COMMISSION ON UNITED STATES-PACIFIC TRADE AND INVESTMENT POLICY, BUILDING AMERICAN PROSPERITY IN THE 21<sup>ST</sup> CENTURY: U.S. TRADE AND INVESTMENT IN THE ASIA PACIFIC REGION 37, 40 (Apr. 1997). In the long run, the Dewey Ballantine proposal envisions that the WTO can play a role in addressing private anticompetitive restraints: the WTO should provide a robust guarantee of market access. Trade negotiators would attach an explicit warranty to every trade concession that private restraints of trade, private collaboration with government bodies, or informal administrative guidance will not frustrate the intent of the parties by undermining the value of a trade concession. If this warranty is violated, the aggrieved party would have grounds for seeking WTO-sanctioned compensation for the impaired concession. Dewey Ballantine Submission at 8, 9.

<sup>178</sup> A similar proposal was advanced in 1997 by the Coalition for Open Trade (COT), an organization that includes several large American companies and labor unions and is represented by the Dewey Ballantine law firm. COT recommended that the USTR be given the authority, after a full evidentiary proceeding, to issue cease and desist orders against “restrictive business practices” found to burden U.S. commerce. These restrictive business practices would be defined as coextensive with the practices identified by the U.S. courts as *per se* illegal under U.S. antitrust law. Penalties would be imposed both for engaging in restrictive business practices and for violating cease and desist orders, and such orders would be reviewable by U.S. Courts of Appeal. Alternatively, COT has proposed that the FTC, rather than USTR, could be given the authority to issue and seek court enforcement of cease and desist orders. USTR would make the initial finding as to whether specific restrictive business practices are burdening U.S. commerce. If the finding were affirmative, and if no remediation occurred within three months, USTR would turn its findings over to the FTC, which could then issue a cease and desist order. COUNCIL FOR OPEN TRADE, ADDRESSING PRIVATE RESTRAINTS OF TRADE: INDUSTRIES AND GOVERNMENTS SEARCH FOR ANSWERS REGARDING TRADE AND COMPETITION POLICY 32-33 (1997).

a finding would then create a presumption on the part of either the FTC or Department of Justice would pursue an enforcement action.<sup>179</sup>

This Advisory Committee believes that the proposal to undertake an empirical or analytical inquiry to analyze the nature and extent of market access barriers resulting from anticompetitive restraints on trade flows is constructive. Indeed, in the following section of this chapter, the Advisory Committee recommends an examination of this kind, involving both trade and competition policy experts. However, the proposals are problematic in that they imbue trade agencies with antitrust responsibilities, and they put primary emphasis on U.S. unilateral tools for resolving international competition problems. Instead, this Advisory Committee believes that a more broadly international approach is necessary, one that preserves the ability of the United States to use its antitrust laws to reach offshore conduct where necessary and possible, but one that focuses first on eliciting cooperation and coordination with other jurisdictions, where possible.

In fact, if the U.S. interagency process is working as it should, economic disputes that appear to contain some mixture of private and public restraints are considered in a variety of interagency settings such as those that occur in the National Economic Council, in the USTR's trade policy review group, or elsewhere. It should be natural and is clearly important for the U.S. antitrust agencies to coordinate closely with other executive branch agencies about international economic disputes that require consensus within the U.S. government and particularly those disputes that may implicate the conduct of both private firms and governmental practices. In cases that appear to have some mix of this kind, the dispute could conceivably be handled either as an antitrust dispute under the Sherman Act or as a trade dispute under U.S. trade laws, notably Section 301, and policymakers would need to confer, as they often do, on the proper disposition of the case.

Proposals that vest U.S. trade agencies with the ability (or near ability) to make "findings" of anticompetitive practices abroad do not solve the real-world problems faced by antitrust enforcers, namely, the requisite gathering of strong evidence to support the claim. Further, these proposals can easily politicize antitrust determinations to the detriment of such a law-based adjudicatory process.

The Advisory Committee believes that antitrust agencies are in the best position to evaluate the *anticompetitive* nature of private restraints and to follow up with either an enforcement action or, if appropriate, a referral to the competition authority in the country where the private restraint exists. Trade agencies, for their part, are better able to assess the trade impact of governmental restraints. This is the allocation of responsibilities under existing law, and it is viewed as fully appropriate by the Advisory Committee.

It is important that enforcement authority over private restraints reside in an agency with responsibility for antitrust policy, rather than a trade agency, such as USTR, where the hortatory and

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<sup>179</sup> Padilla ICPAC Spring Hearings Testimony at 117, 142-43. Eastman Kodak retained the law firm of Dewey Ballantine to represent it in its Section 301 petition before the USTR involving the Japanese film market.



often political aspects of Section 301 cases are better suited to governmental practices. Application of this same methodology can be intimidating when applied to firm practices.

If the trade methodology were to be applied to allegedly anticompetitive private practices occurring offshore, U.S. enforcement against firms operating in foreign markets could occur under a different standard than that applied to firms doing business in the United States. The consequences of an asymmetrical treatment of firms operating in foreign markets versus domestic practices would be adverse. Not only could it call into question the attractiveness of the U.S. environment, but it might stimulate comparable responses by other nations, which U.S. firms would doubtless find objectionable.

For these reasons, improving international cooperation and effective antitrust enforcement is a more principled way to address such problems in the world than trying to equip U.S. trade agencies with new legal tools to undertake unilateral actions.

### **The Advisory Committee's Approach for Applying U.S. Extraterritorial Enforcement**

To improve the effectiveness of U.S. antitrust enforcement, including that pertaining to foreign restraints on U.S. exports, the Advisory Committee believes that the Department of Justice must continue to develop its multipronged strategy of enhancing the credibility as well as the utility of bilateral instruments, expanding multilateral initiatives and preserving its enforcement tools for use when necessary. The following outlines the Advisory Committee's proposed approach with respect to extraterritorial enforcement action.

#### *Consider Foreign Enforcement*

To minimize the possibility for conflicts arising from U.S. extraterritorial enforcement and to increase the possibility of meaningful remedy of the perceived problem, the Advisory Committee supports the view that the Antitrust Division review the ability of the foreign authority in addressing the claim. This approach is consistent with current Justice Department policy, which states that the department will consider whether the objectives to be obtained by the assertion of U.S. law could be achieved in a particular instance by enforcement efforts of a sister agency in another nation. In many instances, the affected foreign nation's antitrust enforcers are likely to be in a better position to complete the investigation of anticompetitive conduct and develop appropriate remedies.

According to the 1995 Antitrust Enforcement Guidelines, "the Agencies may consult with interested foreign sovereigns through appropriate diplomatic channels to attempt to eliminate anticompetitive effects in the United States" in lieu of bringing their own enforcement action.<sup>180</sup> If the U.S. has a cooperation agreement with the foreign antitrust agency, such a request may be made

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<sup>180</sup> 1995 DOJ/FTC INTERNATIONAL GUIDELINES at 21.

through a formal positive comity referral. Otherwise, the request for enforcement may be made informally.

*Using Extraterritorial Enforcement When Necessary*

When a requested nation is unwilling or unable to investigate allegations of anticompetitive conduct by private firms or some mix of private and public conduct within its borders, then the United States should stand ready to apply its own antitrust laws against anticompetitive conduct that has a “direct, substantial and reasonably foreseeable” effect on U.S. commerce.

Market-blocking restraints abroad challenge the antitrust agencies with the difficulties of gathering evidence and proving a violation of the U.S. antitrust laws. In addition to these obstacles, transnational cases can be expensive and time-intensive. Some might argue that pursuing such cases is an improper allocation of the scarce resources of the Antitrust Division. There is no ready solution for those problems. But it is also true that the potential use of U.S. remedies is important. It may, for example, be a factor that encourages foreign jurisdictions to enter into cooperation agreements with the United States. It is important that the United States have a credible ability to prosecute these violations of the antitrust laws; without that ability, nations with haphazard enforcement records that are sheltering such conduct have little incentive to act. A track record of acting against such restraints will create a climate in which nations are less able to ignore anticompetitive practices in their jurisdictions that have a deleterious impact on the flow of international trade.

The Advisory Committee recognizes that U.S. extraterritorial antitrust enforcement against foreign market-blocking restraints is a sensitive issue for foreign governments that can affect not only antitrust enforcement cooperation efforts, but international law enforcement cooperation more broadly. Because of these concerns and the obstacles to successful prosecution, the expected results of extraterritorial enforcement against offshore restraints on U.S. exports should not be overestimated. Indeed, it is for such reasons that the Advisory Committee recommends that a first step in attempting to address these restraints should be to review whether it is realistic to approach the foreign nation where the practices occur and seek its cooperation. However, the Advisory Committee believes that where such cooperation is not forthcoming, a willingness to use U.S. antitrust enforcement tools may have the salutary effect of acting as lever to encourage excluding nations to pursue their own enforcement actions. A tenable U.S. antitrust enforcement effort against market blocking restraints may contribute to a greater culture of cooperation and enforcement. It is also essential to the credibility of U.S. antitrust enforcement, that parties that bring cases to the Department of Justice have confidence that the Antitrust Division will vigorously pursue cases, including market-blocking foreign cases, when they appear to be well founded and when no superior alternatives such as positive comity are available. Further, the Advisory Committee recommends that the U.S. antitrust agencies continue to have responsibility vis-à-vis trade agencies over legal determinations of the anticompetitive conduct of private firms, at home or abroad.



*Develop a Base of Evidence on Export Restraints*

One of the most challenging aspects of U.S. enforcement against anticompetitive restraints of U.S. exports is developing adequate evidence of anticompetitive conduct. In any particular case, that information and analysis will be highly fact specific. It may, however, also be useful to undertake some broader empirical analysis of cases and conditions.

As this chapter has shown, reliable empirical data about the existence and pervasiveness of anticompetitive business restraints abroad that restrict access to markets are generally lacking, and the effects of the identified restraints on the global economy in general and on U.S. exports in particular are often disputed. Indeed, several business organizations such as the U.S. Council for International Business and the Transatlantic Business Dialogue as well as a number of trade and antitrust experts have urged further study of the problem of market access and market contestability.<sup>181</sup> To help businesses and governments better understand the nature and extent of such restraints, the Advisory Committee recommends that the U.S. government commission a study that would attempt to assess the magnitude of global market access problems that stem from some combination of private or governmental restraints. At the least this study could evaluate the effects of known problems. In Chapter 4, this Report suggested an international collaboration to examine and understand global transnational cartels and their market effects. That review should be linked to this suggested examination. And indeed, a U.S. study could be undertaken in collaboration with foreign experts or governments, or indeed even undertaken under the aegis of international organizations such as the OECD.

Any study of aggregate effects or market contestability is obviously difficult. Such inquiries might consider questions at the heart of the debate between trade and competition policy officials: In the international context where there is less likely to be direct evidence, such as a signed agreement among domestic firms with market power to keep out imports, are there other indicators or measures that governments might rely upon as evidence of market foreclosure? Are any trade or other indicators more credible than others? Of course, assessments about foreclosure are complex. Many measures of market access cannot differentiate between benign versus anticompetitive explanations for disappointing performance in penetrating a market. Circumstantial data may not accurately reflect whether anticompetitive practices exist in a market. Low market penetration by

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<sup>181</sup> See USCIB Submission at 2; TABD Overall Conclusions; Dewey Ballantine Submission at Summary, p. 1. The Federal Trade Commission engaged in such a study in 1916 during a period of commercial history when international commerce was being distorted by formal governmental cartels. The FTC used several methods for gathering information including: (1) special reports for the Commission from United States consuls who submitted national reports for the countries to which they were posted; (2) public hearings where manufacturers, exporters, and others interested in export business appeared and discussed foreign trade conditions; (3) systematic study of all the recent published material of importance regarding foreign cartels, syndicates, combinations and other factors affecting American exporters in overseas markets; (4) surveys, which were sent to over 25,000 businessmen of which 10,000 replies were received. 2000 more detailed surveys were also completed; and (5) field investigations by Commission field agents. FEDERAL TRADE COMMISSION, COOPERATION IN AMERICAN EXPORT TRADE 13-15 (1916).

foreign imports is a problematic indicator because it is impossible to determine what the proper level of market share should be absent any anticompetitive restraints.<sup>182</sup> Similarly, an attempt to draw inferences from a lack of new entrants to a market also presents problems. In a contestable market, sellers are forced to price competitively and thus other firms may have no incentive to enter the market.<sup>183</sup> Moreover, inferring that a market is blocked if domestic prices are higher than foreign prices may be a mistake; discounts, sales or reduced services may all make the actual transaction price lower than the published price.<sup>184</sup> There are doubtless many competing explanations for almost every observed market outcome, including those outcomes that are thought to be anomalous. And, because some of those explanations are benign, inferences drawn on market outcomes alone are likely to be unreliable.<sup>185</sup>

Although many complex questions arise, the Advisory Committee nonetheless believes that further analytical and empirical work needs to be undertaken and hence sees some value in studies commissioned or undertaken by the U.S. government, or with the cooperation of foreign governments, if possible. The expectation of this Advisory Committee is not that such a study would establish definitive estimates, but that it could provide a firmer foundation of evidence and analysis for informed national decisionmaking and international discourse.

#### **THE ROLE FOR INTERNATIONAL ORGANIZATIONS**

As it stated earlier in this chapter, the Advisory Committee believes that bilateral cooperation arrangements are important instruments for fostering cooperation between jurisdictions and thereby improving prospects for increasing the effectiveness of enforcement. The Advisory Committee also believes, however, that bilateral cooperation, even with active utilization of positive comity, is unlikely to be a sufficient response to all of the competition problems and the opportunities presented by the global economy.

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<sup>182</sup> See Edward M. Graham and Robert Z. Lawrence, *Measuring the International Contestability of Markets*, 30 JOURNAL OF WORLD TRADE 7, 15 (1996).

<sup>183</sup> *Id.* at 15.

<sup>184</sup> *Id.* at 16-17.

<sup>185</sup> The Advisory Committee undertook to “test the waters” in this arena and invited two U.S. economists to prepare a background paper that assessed the empirical literature on market access and cartels. See Valerie Suslow and Simon Evenett, “Assessment of Empirical Literature on Cartels and Market Access: An Economic Analysis”, Paper Prepared for the International Competition Policy Advisory Committee (September 23, 1999). This paper was then circulated to a wider group of respected economists for comment. With respect to the market access question, the paper argued that existing measures of market access identified in the economics literature cannot adequately differentiate between benign versus anticompetitive explanations for poor export performance. Few determinants of market access are observable and usually cannot be taken into account in econometric analysis. However, the authors suggest that policymakers can identify a set of questions or filters that offer some guidance and at least serve to eliminate less compelling claims.



Bilateral cooperation may not, for example, provide adequate incentives for countries to dismantle beggar-thy-neighbor practices. The structure of national law itself may be excessively territorial, stopping at the nation's shores despite negative spillover effects in other jurisdictions. National law also can be excessive if it allows states and state-owned entities certain protections that harm international trade.

History is replete with many instances where a nation has perceived its national economic policy to be in conflict with other nations — because of national industrial policy priorities, for example, or because countries disagree about the facts surrounding alleged market access restrictions or about what constitutes practices to be proscribed by competition laws. An expanding web of bilateral arrangements, especially with positive comity provisions, can go some way in addressing some of these issues. Yet, not all nations are likely to be parties to effective bilateral cooperation agreements and hence will not be able to use or develop positive comity or align with strong competition policy regimes. In other words, bilateral arrangements can be extremely useful in some contexts but are unlikely to prove a complete answer to the transnational competition policy problems that the global economy is facing.

This Advisory Committee therefore believes that the United States should continue with its vigorous expansion of bilateral cooperation agreements and positive comity provisions, but that it must also continue to develop its broader multilateral engagement on competition policy matters. These efforts should encompass a variety of forums and should seize opportunities for developing more nearly seamless markets as well as facilitating meaningful cooperation on practical enforcement problems. In short, efforts should be made to:

- Develop a more broadly international perspective toward competition policy, with the goal of reducing parochial actions by governments and firms;
- Foster greater soft harmonization of competition policy systems;
- Develop improved ways of resolving conflicts;
- Develop a greater appreciation for the negative spillovers from domestic firm or governmental actions; and
- Develop a degree of consensus among nations on what constitutes best practices in competition policy and its enforcement.

While the reduction of governmental barriers to trade and the integration of economies have given new emphasis to cross-border trade effects of private anticompetitive restraints, this problem is in fact not new to the international trade agenda. An early attempt to address restrictive business practices on a multilateral level was the 1948 Havana Charter, which aimed to establish an International Trade Organization (ITO) and included a chapter on restrictive business practices.<sup>186</sup> After that charter failed, the United Nations Economic and Social Council (ECOSOC) endorsed in

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<sup>186</sup> United Nations Conference on Trade and Employment, Havana Charter for an International Trade Organization, Final Act and Related Documents, 1948.

1953 a draft convention that would have established a new international agency to receive and investigate complaints of restrictive business practices. The United States rejected the draft convention, arguing that differences in national policies and practices were so large they would make the new international organization ineffective.<sup>187</sup> Concerns were also expressed that the one nation, one vote provision would allow nations hostile to the United States to instigate harassing complaints.<sup>188</sup>

Little more happened on this issue multilaterally until 1958, when a GATT Experts Group issued a report recommending that business practices be left outside of dispute settlement review. The majority contended that the absence of consensus and experience in this policy area made it unrealistic to try to arrive at any multilateral agreement regarding the treatment of international restrictive business practices.<sup>189</sup> In 1960 the GATT adopted a resolution recommending that the parties to a dispute consult with each other on the issue of restrictive business practices.<sup>190</sup>

In 1973, at the instigation of the developing nations, negotiations on restrictive business practices were initiated in the United Nations Conference on Trade and Development (UNCTAD). In 1980 the U.N. General Assembly adopted UNCTAD's Set of Multilaterally Agreed Principles and Rules for the Control of Restrictive Business Practices.<sup>191</sup> However, the Set is nonbinding, and it has not become a source of international law.<sup>192</sup> Although UNCTAD has an extremely broad membership base, it has not evolved into a dynamic organization for the consideration of competition policy issues. Since the successful completion of the Uruguay Round in 1994, consideration of trade and competition issues in a variety of fora including the WTO has increased.

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<sup>187</sup> The draft convention included the same list of restrictive practices as the Havana Charter, with one exception relating to technology agreements. See Diane P. Wood, *The Impossible Dream: Real International Antitrust*, 1992 U. CHI. LEGAL F. 277, 284-5 [hereinafter Wood]. For details of the draft convention, see F. M. SCHERER, *COMPETITION POLICIES FOR AN INTEGRATED WORLD ECONOMY* 39 (1994) [hereinafter SCHERER].

<sup>188</sup> SCHERER at 30.

<sup>189</sup> GATT Resolution of November 5, 1958, 7<sup>th</sup> Supp. BISD 29 (1959) cited in Dale B. Furnish, *A Transnational Approach to Restrictive Business Practices*, 4 INT'L LAWYER 317, 328, n. 54 (1970). See also Merit E. Janow, *Competition Policy and the WTO*, in *THE URUGUAY ROUND AND BEYOND* 279, 281 (J. Bhagwati and M. Hirsh, ed. 1998).

<sup>190</sup> GATT Resolution, BISD 28 (9<sup>th</sup> Supp, 1961).

<sup>191</sup> This voluntary code contained several provisions calling for special concern to the problems facing developing nations. The Code's substantive provisions condemn collusive anticompetitive actions such as price-fixing, collusive tendering, market or customer allocations, sales, or production quotas and various kinds of concerted refusals to deal. The Code also condemns abuses of dominant position such as predatory behavior, discriminatory commercial terms and anticompetitive mergers. Wood at 286.

<sup>192</sup> Wood at 287, See also GLOBAL FORUM ON COMPETITION AND TRADE POLICY, *HARMONIZATION OF INTERNATIONAL COMPETITION LAW ENFORCEMENT* 15, n. 73 (1995).



More than forty years have passed since the 1958 GATT experts group argued that national competition laws and antitrust institutions were necessary preconditions to expanded international efforts. Since then the number of competition regimes around the world has grown considerably, but the degree of experience with competition laws and policies still varies greatly. In the view of this Advisory Committee, new or expanded multilateral initiatives must be structured in a flexible manner to recognize that diversity of experience. With that objective in mind, the following discussion looks first at the institutional capabilities of existing international organizations and then at the views of many experts on the appropriate role of these organizations regarding the intersection of trade and competition policy.

### **The Organization for Economic Cooperation and Development (OECD)**

No binding multilateral agreements on competition policy have been adopted, but a variety of consultative mechanisms have been established, most notably at the OECD. The OECD has been at the forefront of efforts to consider the international dimensions of competition policy, serving as an important consultative body for countries with competition regimes as well as a source of technical assistance to many jurisdictions introducing competition laws and policies.<sup>193</sup>

At least, two different OECD committees have engaged in serious work on competition policy: the Competition Law and Policy Committee (CLP), known before 1987 as the Committee of Experts on Restrictive Business Practices; and the Joint Group on Trade and Competition. The CLP is made up of representatives from competition enforcement authorities of the 29 OECD members and “aims primarily to promote common understanding and cooperation among competition policy authorities and officials.”<sup>194</sup> As a venue where enforcers can meet and discuss competition issues, the CLP has encouraged greater convergence in the analysis of substantive competition law and policy. Through the production of monographs and more recently, through roundtable discussions and framework papers, the CLP has assisted member countries in developing a common understanding of competition principles. The OECD has also engaged in outreach to nonmember countries to help them develop competition legislation and train judges to develop the analytical tools to review competition cases. More formally, the OECD has produced nonbinding recommendations, including a 1998 Recommendation condemning hard core cartels and a 1995 recommendation on international cooperation among competition authorities (see Chapter 4).<sup>195</sup>

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<sup>193</sup> For a fuller description of the OECD’s activities on competition policy, *see* P.J. LLOYD AND KERRIN M. VAUTIER, *PROMOTING COMPETITION IN GLOBAL MARKETS: A MULTI-NATIONAL APPROACH* 131-138 (1999). *See also* the testimony before the Committee of Bernard Phillips and Mark Warner, who described the scope and nature of the OECD’s work on trade and competition policy. Testimony of Bernard Phillips and Testimony of Mark Warner, OECD, ICPAC Hearings (Apr. 22, 1999), Hearings Transcript at 150-179.

<sup>194</sup> *See* OECD Web Site located at <[www.oecd.org/daf/clp/COMMTE.htm](http://www.oecd.org/daf/clp/COMMTE.htm)>.

<sup>195</sup> The 1995 Revised Recommendation of the Council Concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade is the most recent in a series of such OECD recommendations. This Recommendation contains provisions for a notification process between OECD Members so that Member countries

The OECD's Joint Group on Trade and Competition has also pursued a work program that seeks to increase members' understanding of issues relevant to the interface of trade and competition policy. One series of reports examines legal and regulatory exceptions and exclusions in existing competition laws. Another series addresses various issues that affect both trade and competition policy; these include conceptual issues, vertical restraints, consistencies and inconsistencies between trade and competition policy, and competition elements in international agreements. Similar to the WTO Working Group on Trade and Competition, the OECD Joint Group has provided a forum for trade policymakers and competition enforcers to meet and develop a common understanding about the framework for addressing issues that affect both trade and competition policy.

The OECD's strengths in competition policy lie in its ability to encourage soft convergence among its members. Because OECD members make up most, if not all, of the world's advanced economies, greater substantive convergence in competition policy can have significant beneficial effects in developing a worldwide competition culture. Yet, although the OECD contributes significantly to advancing the international competition policy debate, institutional limitations constrain its ability to play a more expansive role in developing a global approach to trade and competition interface issues. For one thing, the organization is perceived by nonmember nations as a forum for more developed countries. More recently, the failure of the negotiations on a Multilateral Agreement on Investment (MAI) which occurred at the OECD may have cast a shadow over its ability to serve as a forum for negotiating international agreements. These limitations notwithstanding, the OECD is clearly the international organization with the greatest depth of experience in considering a broad range of competition and trade policy issues. Its deliberations remain important and it is embarking on new collaborations with other international organizations, such as the World Bank, that appear promising.

## **The World Trade Organization**

The World Trade Organization, by virtue of its inclusiveness (with 135 members from developed and developing economies) and its centrality as a forum for negotiating binding rules governing the economic conduct of nations, holds a unique place among international organizations and rule-making bodies. The expansion of areas of coverage introduced in the Uruguay Round of multilateral trade negotiations as well as improved dispute settlement procedures have further enhanced the importance of the WTO to the world community.

The WTO (and the GATT before it) is centrally concerned with the trade-distorting conduct of governments. This is where the expertise of WTO resides and where it has an established track record. With a few exceptions such as antidumping, WTO rules have not been focused on firm

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are aware that their interest may be affected by another Member's antitrust enforcement actions; implementation of positive comity principles; consideration going to legitimate interests of other nations in accordance with the recommendations of the OECD; cooperation between members in the enforcement of their antitrust laws, including through the exchange where possible of confidential information; conciliation of disputes between member countries, if requested and agreed upon by all the member countries involved.



conduct. Instead, the WTO has developed an extensive set of rules that oblige its member governments to abide by agreed-upon nondiscrimination principles and the market-opening commitments contained in tariff and other schedules.

Before the WTO came into existence in 1995, several GATT cases had arisen where the petitioning government alleged that the actions of other governments facilitated or encouraged exclusionary conduct by private firms. For example, in a 1988 case, a GATT panel held that even nonbinding administrative guidance could constitute a government measure, if certain criteria were met.<sup>196</sup> In that case, which involved restraints on exports of semiconductors by the Government of Japan, the specific criteria identified by the panel included: (1) reasonable grounds to believe that the government measures created sufficient incentives to persuade private parties to conform their conduct to the nonmandatory measures, and (2) that the effectiveness of the private conduct was “essentially dependent” on the nonmandatory actions taken by the government. In the more recent film dispute between the United States and Japan, the panel held against the United States on the facts of that case. On the general question of actionable government measures, however, the panel built upon the semiconductor case to argue that analysis of alleged “measures” must “proceed in a manner that is sensitive to the context in which these governmental actions are taken and the effect they have on private actors.”<sup>197</sup>

Few cases have come before the WTO that implicate a mix of nontransparent private restraints supported or fostered by some government measures, and neither the GATT nor the WTO has been a primary forum for resolving disputes centering on allegations of private restraints of trade that foreclose access to markets. And except in narrow circumstances such as those discussed above, international trade rules have not held governments responsible for the private actions of firms. In this sense, there is no multilateral set of rules that hold governments accountable for firm practices that undermine open markets.

That does not mean, however, that the WTO is devoid of features that are congenial to competition policy objectives. Indeed, the basic nondiscrimination principles of national treatment, most-favored-nation treatment, and transparency that compose the foundation of the WTO support the operation of impartial competition policy regimes. And a domestic policy framework that ensures that private firms do not, through private arrangements, inhibit the flow of goods and services that governments have agreed should be subject to market forces is equally important to

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<sup>196</sup> See *Japan-Trade in Semiconductors*, GATT, BISD, 35th Supp. 116 at 155 (1989)(decision adopted May 4, 1988).

<sup>197</sup> See *Japan-Measures Affecting Consumer Photographic Film and Paper*, WTO Doc WT/DS44/R(panel report issued Mar. 31, 1998) at 389. Indeed the opinion argues that “government policy or action need not necessarily have a substantially binding or compulsory nature for it to entail a likelihood of compliance by private actors in a way so as to nullify or impair legitimately expected benefits within the purview of Article XXII:1(b). Indeed, it is clear that non-binding actions, which include sufficient incentives or disincentives for private parties to act in a particular manner can potentially have adverse effects on competitive conditions of market access.” *Id.* at 389-90.

support the international trading system. In at least these ways, the two policy frameworks are mutually supportive.

### *Competition Policy Features of Existing WTO Agreements*

Furthermore, several WTO agreements contain competition policy concepts or elements, although these are fragmentary. Following are the most notable examples:<sup>198</sup>

- The Basic Telecommunications Agreement contains important “competitive safeguard” provisions designed to facilitate procompetitive interconnection and objective, neutral regulation of foreign monopolies, as well as the maintenance of appropriate measures to prevent certain anticompetitive practices.<sup>199</sup> Because telecommunications traditionally has been a heavily regulated sector, dominated by state monopolies or state-sanctioned firms with a dominant market position, commitments by governments to permit competitive access to the telecom markets ran the risk of being meaningless in the absence of commitments directed at restraining the conduct of such domestic firms with domestic market dominance.
- The General Agreement on Trade in Services (GATS) also contains several provisions material to competition policy. Specifically, Article VIII requires each member to ensure that a monopoly supplier does not “abuse its monopoly position” when it competes in the supply of services outside of its area of authorized monopoly. Article IX:1 provides that “Members recognize that certain business practices of service providers, other than those falling under Article VIII, may restrain competition and thereby restrict trade in services.” And Article IX:2 obliges members to accede to any request for consultation with any other member on such practices “with a view to eliminating” them.

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<sup>198</sup> Mention of a few additional examples may be instructive: The Safeguard Agreement in article 11.1 prohibits “members from encouraging or supporting the adoption or maintenance by private enterprises of measures equivalent to voluntary export restraint exercised by the government.” The Technical Barriers to Trade Agreement (“TBT”) in Article 3.4 contains a provision stating that a WTO member shall “not encouraging private control organizations to discriminate against foreign products with regard to testing and certification.” The Trade-Related Intellectual Property (TRIPS) agreement recognizes in Article 8, paragraph 2 that measures may be necessary to “prevent the abuse of intellectual property rights by rights holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.” And, Article 40 recognizes that “some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology.”

<sup>199</sup> See Section 1.1 of the Fourth Protocol to the General Agreement on Trade in Services. A “major supplier” covered by these safeguard provisions is one that has the power “to materially affect the terms of participation (having regard to price and supply), either owing to control over essential network facilities or its market position.” That Agreement defines anticompetitive practices to include three practices: cross subsidization; use of information obtained from competitors; and withholding technical and commercial information about essential facilities. Not all of these terms are further defined, so it would presumably be up to a dispute settlement panel to come up with their own interpretation of key terms.



- Competition policy arises indirectly in Article 9 of the Agreement on Trade-Related Investment Measures (TRIMS), which requires the Council for Trade in Goods to review the operation of the TRIMS and propose necessary amendments to it by the end of 1999. The council was directed to consider whether those amendments should include provisions on competition policy.
- In 1960 the GATT agreed to permit its members to request consultation on private practices with adverse trade effects. As noted, this has been invoked only once, in 1996 by the United States in the context of the film dispute with Japan, and consultations under this provision did not commence.

Two additional WTO agreements, the Trade-Related Intellectual Property (TRIPS) accord and the Accounting Disciplines agreements, are notable in that they both suggest alternative “architecture” for including more general, though perhaps minimal, provisions on competition policy into the WTO, should countries decide that such is the desired course of action. The TRIPS accord probably offers the closest existing model that may also be congenial for competition policy.<sup>200</sup> Traditionally, the GATT focused on limiting distortions introduced by governments; these limits told governments what they could not do rather than setting out a set of affirmative obligations that they were required to undertake. The TRIPS accord introduced an entirely different construct by obliging countries to introduce intellectual property laws that contained some minimum common features to those laws, and by requiring WTO members to provide nondiscrimination, national treatment, transparency and most-favored-nations treatment. TRIPS also requires member countries to introduce effective national enforcement systems, the precise structure and design of which are left in the hands of national authorities but which must provide effective measures for both private and governmental enforcement. The agreement specifically requires countries to introduce enforcement procedures that are sufficient to “permit effective action against any act of infringement.”<sup>201</sup> These provisions, introduced during the Uruguay Round of Multilateral Negotiations, were subject to a five-year moratorium on the use of dispute settlement for less developed economies, notably on nonviolation nullification and impairment. As a result, the enforcement provisions of TRIPS have been largely untested as of this time.<sup>202</sup>

More recently, in December 1998 the WTO Council on Trade in Services adopted the WTO Disciplines on Domestic Regulation in the Accountancy Sector; these are nonbinding principles that

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<sup>200</sup> For example, environmental or labor interests may similarly see the TRIPS approach as one that can incorporate other new areas where governments can agree on the value of additional affirmative obligations.

<sup>201</sup> See Article 41 of the TRIPS.

<sup>202</sup> Technically, this moratorium expired in January 2000.

WTO members are exhorted to follow.<sup>203</sup> These principles are relevant because they suggest that the WTO may be able to accommodate various “framework” agreements that are nonbinding guidance to members on matters of domestic regulation or oversight. But this proposition also relies on a limited track record; the GATT and now the WTO have not been structured as forums to help governments consult broadly on shared regulatory problems.

*The Working Group on the Interaction Between Trade and Competition Policy*

The inclusion of competition policy into the Singapore Work Program in December 1996 and the formation of the Working Group on the Interaction Between Trade and Competition Policy were important developments in the WTO. They may reflect a recognition that competition policy can work in tandem with trade policies and efforts at regulatory reform to foster markets that are more open, contestable and competitive, to the benefit of foreign and domestic interests alike. At the same time, a discussion of competition policy within WTO also reflects the long-standing recognition that private restraints can nullify the benefits of negotiated trade liberalization measures, thereby reducing the benefits of the negotiated trade bargains and potentially the very support for liberalization of trade.<sup>204</sup>

This Advisory Committee’s review of the work undertaken by that Working Group since its inception suggests that it has been constructive and active. It has construed its mandate to consider a very broad set of issues such as the relationships among the objectives, principles, scope, and instruments of trade and competition policies; the types and effectiveness of existing instruments, standards, and activities regarding trade and competition policies; and the interaction between trade and competition policies, including a review of the effects of anticompetitive firm practices state monopolies on international trade, and the relationship between trade-related aspects of intellectual property and investment and competition policy.<sup>205</sup>

As of this writing the Working Group has held 10 formal meetings since it was established in December 1996 and received a total of 129 written contributions, about 60 of which have come from developing or transition countries. In addition, papers have been submitted from other international organizations, from the WTO Secretariat and from the Chairman. The report of the Working Group chronicles not only a very broad range of issues examined, but many areas where WTO members disagreed.

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<sup>203</sup> See WTC, Report to the Council for Trade in Services on the Development of Disciplines on Domestic Regulation in the Accountancy Sector, S/WPPS/4 (Dec. 10, 1998).

<sup>204</sup> The 1960 GATT Decision on Arrangements for Consultations on Restrictive Business Practices, for example, “recognizes that business practices which restrict competition in international trade may hamper the expansion of world trade and economic development in individual countries and thereby frustrate the benefits of tariff reduction and removal of quantitative restrictions or may otherwise interfere with the objectives of the General Agreement on Tariffs and Trade.” GATT Resolution, BISD 28 (9<sup>th</sup> Supp, 1961)

<sup>205</sup> See 1998 WTO Trade and Competition Working Group Report at 8.



It was clear from the outset that the initiation of the Working Group did not mean that international negotiations in the area of competition policy were a foregone conclusion. The Ministerial Declaration stated that the work undertaken in the competition policy arena (and other areas) “. . . shall not prejudice whether negotiations will be initiated in the future . . .”<sup>206</sup> However, the Chairman of the Working Group has noted that its discussions have heightened the understanding that the interface of international trade and competition has to be addressed in some way. Moreover, the debate has obliged competition enforcers to “abandon their situation of splendid isolation,” with a corresponding recognition by trade officials of the limits to negotiation as a means of securing access to markets.<sup>207</sup> It seems that the dialogue and hard work undertaken by the Working Group has already made a contribution.

### **Views on the Appropriate Role for the WTO**

The question now facing policymakers is what further steps, if any, should be undertaken at the World Trade Organization in the area of competition policy? This is a question of continuing relevance in light of attempts to initiate a next round of multilateral trade talks, sometimes called a Millennium Round, sometime in the future. Should competition policy be part of the negotiating framework for a resurrected Millennium Round? If so, what should be considered: a set of rules subject to dispute settlement procedures; frameworks for transparency and nondiscrimination obligations to remove bars to market access; or some other aspect of the problem? What is the appropriate role for the WTO over the longer term on competition policy matters? The questions were raised before the Seattle Trade Summit of December 1999 and continue after its inconclusive end.

In the course of its outreach activities, the Advisory Committee heard from senior officials from more than 10 jurisdictions, as well as business groups, lawyers, academics, representatives from international organizations, and other experts on these questions. The scholarship in this area is also vast, and the Advisory Committee staff has considered much of it. This Advisory Committee has also given close consideration to the views expressed by U.S. and foreign competition officials.

#### *Views of Governments*

As noted, the WTO Working Group received submissions and participation from many countries. A full recounting of those views is not possible here. In addition, the positions of a number of jurisdictions have altered somewhat in the run-up to the Seattle summit. The positions of a few jurisdictions are described below as they represent important polarities.

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<sup>206</sup> See Singapore Ministerial Declaration, Para. 20, WT/MIN (96)/Dec. (Dec. 13, 1996).

<sup>207</sup> Frederic Jenny, *Globalization, Competition and Trade Policy: Issues and Challenges*, in *TOWARDS WTO COMPETITION RULES: KEY ISSUES AND COMMENTS ON THE WTO REPORT (1998) ON TRADE AND COMPETITION 3* (Roger Zäch, ed., 1999)

U.S. GOVERNMENT: While actively supporting the deliberations of the WTO's Trade and Competition Policy Working Group, the U.S. government has taken a cautious tone regarding the WTO's role as a forum for negotiating any rules or framework governing competition policy. Assistant Attorney General Klein has argued on numerous occasions that for the time being, he sees greater practical value in bilateral cooperation arrangements, such as those the United States has entered with Australia, Canada and the European Commission than in negotiated rules at the WTO. This network of bilateral arrangements, coupled with technical assistance to new regimes and dialogue at the OECD, WTO, regional groupings, and other international forums, have been the core policy elements of U.S. international antitrust policy.

Klein has also raised several concerns about the WTO venturing into the terrain of competition policy.<sup>208</sup> In Klein's view, the global community does not yet fully know what key trade and competition questions may benefit from binding international agreements, let alone whether there is any possibility of developing a consensus on these issues. Additionally, it is not clear that the WTO is well suited to solving practical antitrust problems. Moreover, Klein has said, WTO oversight of antitrust actions by governments would "involve the WTO in second-guessing prosecutorial decision making in complex evidentiary contexts -- a task in which the WTO has no experience and for which it is not suited -- and would inevitably politicize international antitrust enforcement in ways that are not likely to improve either the economic rationality or the legal neutrality of antitrust decision making."<sup>209</sup>

THE EUROPEAN UNION: While stressing the importance of effective bilateral cooperation as a foundation, former External Affairs Commissioner Sir Leon Brittan and former Competition Commissioner Van Miert have been forceful advocates of a new round of multilateral negotiations focusing on developing a set of competition rules and holding governments responsible for the implementation of those rules. EU officials have proposed that the initial negotiations focus on requiring countries to adopt competition laws based on "core principles" that include rules on restrictive business practices and abuse of market power; provide adequate and transparent enforcement; and provide for international cooperation through exchange of nonconfidential information, notification, and positive comity provisions. Broader substantive coverage could be considered over time, these officials say. The EU proposal suggests that these rules should be subject to dispute settlement, initially only for breaches of common principles or rules relating to the adoption of a competition law structure or that do not appropriately cover agreed disciplines on

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<sup>208</sup> See e.g., Joel Klein, *No Monopoly on Antitrust*, FINANCIAL TIMES, February 13, 1998 at 20, in which Assistant Attorney General Klein stated: "The U.S. experience has shown that a crucial component of international competition policy is cooperation in the enforcement of national or regional competition laws . . . . What is needed is to develop a culture of sound antitrust enforcement, built on the basis of shared experience, bilateral cooperation, and technical assistance to countries just starting down this road."

<sup>209</sup> See Joel Klein, Assistant Attorney General For Antitrust, U.S. Department of Justice, *A Reality Check on Antitrust Rules in the World Trade Organization, And a Practical Way Forward on International Antitrust*, Address before the OECD Conference on Trade and Competition (June 30, 1999) at 6.



anticompetitive practices of an international dimension. Dispute settlement might also be used for alleged "patterns of failure to enforce competition law in cases affecting the trade and investment of other WTO members." Individual cases would not be examined.<sup>210</sup> A group of leading European experts in an influential report in 1995 supported this general approach, but without the nuance limiting the applicability of dispute resolution.<sup>211</sup>

The EU position appears to have some support from the governments of Australia, Canada and Japan, although each of these three jurisdictions also has advanced its own nuanced position on the issues. For example, Japan appears to support the development of international competition rules but also appears to have aligned itself with developing country perspectives, particularly from the Asia-Pacific region, by stressing that multilateral examination of competition policy must also consider antidumping issues.<sup>212</sup>

The head of the Canadian competition authority told the Advisory Committee that the Canadian government concurred with much of the EC proposal. Konrad von Finckenstein urged that work begin at the WTO toward establishing a sound multilateral competition framework and noted that the key building blocks are in the process of being worked out in the OECD. Von Finckenstein suggested that the developing OECD consensus in several areas, including a common approach to abuse of dominance, core principles, and minimum elements for a competition law and antitrust enforcement be formalized, moved into a plurilateral agreement, and combined with a dispute settlement mechanism designed to ensure that members implement these minimum commitments in accordance with their own jurisprudential and legal traditions. Von Finckenstein said the dispute settlement mechanism should not be able to question a country's application of its own antitrust

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<sup>210</sup> See K. Mehta, *The Role of Competition in a Globalized Trade Environment*, Speech before the 3rd WTO Symposium on Competition Policy and the Multilateral Trading System, Geneva, (Apr. 17, 1999).

<sup>211</sup> The experts called for movement on two fronts: first, a further deepening of existing forms of bilateral cooperation; second, the gradual construction of a plurilateral agreement inclusive of a "dispute settlement procedure based on a set of jointly determined competition rules." The EU experts group argued in favor of establishing minimum rules and then gradually expanding the number of countries signing on to those rules. It suggested common principles (e.g., prohibition of cartels, building from the OECD Recommendation in this area) in some instances and rule of reason for other -- e.g., vertical restraints. The report argues for harmonization of procedures in the merger field to give authorities sufficient time to consult each other. Further that state trading enterprises be subject to the same competition rules as commercial enterprises. At the international level, that group suggested that the WTO serve as a forum for analyzing and possibly extending the principles; registering anticompetitive practices and providing for dispute settlement procedures. EUROPEAN COMMISSION, REPORT OF THE GROUP OF EXPERTS: COMPETITION POLICY IN THE NEW TRADE ORDER: STRENGTHENING INTERNATIONAL COOPERATION AND RULES (July 1995).

<sup>212</sup> At the Advisory Committee hearings, the senior Japanese JFTC representative stated: "We also consider that the possibility of making international common rules on competition law and policy should be studied, examining merits and demerits of such rule-making." See Testimony of Takaaki Kojima, Deputy Secretary General, Japan Fair Trade Commission, ICPAC Hearings (Nov. 2, 1998), Hearing Transcript at 86-87. In addition, on August 25, 1999, Japan tabled a formal proposal on competition policy. See Communication from Japan, Preparations for the 1999 Ministerial Conference, Trade and Competition, WT/GC/W/308 (August 25, 1999).

laws.<sup>213</sup> Another Canadian official more recently stated that the Canadian government supports a framework agreement at the WTO “which would include an obligation for member countries to adopt sound competition law, as well as new options for dispute settlement that respect the competence of national authorities.”<sup>214</sup>

The head of the Australian competition authority, Dr. Allan Fels, testified at the Advisory Committee hearings that in his view, the WTO and the OECD “should be used as discussion forums. . . . In the longer term, it’s likely . . . that [the WTO will] take on an enhanced role in the interface between trade and competition policies. If it does this, it’s important that the principles of competition policy should govern the WTO’s work.”<sup>215</sup> Several other jurisdictions have indicated to the WTO that they are at least sympathetic to expanded disciplines at the WTO.<sup>216</sup>

**LESS DEVELOPED COUNTRIES:** Several developing countries have expressed some doubts about the value of negotiations on competition policy. For example, Kenya, on behalf of the African Group, noted that only a limited number of African countries have domestic legislation on competition law and policy or effective enforcement agencies. The African Group advocates continuation of the educative, exploratory, and analytical work of the Working Group on the Interaction Between Trade and Competition Policy with increased technical assistance to developing

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<sup>213</sup> See Submission of Konrad von Finckenstein, Director of Investigation and Research, Canadian Competition Bureau, ICPAC Hearings (Nov. 2, 1998) at 4-6.

<sup>214</sup> See Statement of the Honorable Pierre S. Pettigrew, Minister of International Trade, Address before the Joint Meeting of the Canadian Club of Toronto, the Canadian Institute of International Affairs and the Toronto Board of Trade (Nov. 26, 1999).

<sup>215</sup> See Submission of Allan Fels, Chairman, Australian Competition and Consumer Commission, ICPAC Hearings, (Nov. 2, 1998) at 6.

<sup>216</sup> Korea’s submission to the WTO supported the development of core principles and rules on competition policy with a dispute settlement mechanism but also proposed grace periods for the application of the rules according to the level of each Member’s economic development, exemptions of certain obligations, waivers, reservations and technical assistance. Communication from Korea, Preparations for the 1999 Ministerial Conference, Trade and Competition, WTO, WT/GC/W/298 (August 6, 1999). Norway also supports a multilateral horizontal framework on competition within the WTO, taking due account of the particular needs of Members at different stages of development through transitional arrangements and technical assistance. See Communication from Norway, Preparations for the 1999 Ministerial Conference, Competition, WTO, WT/GC/W/310 (September 7, 1999). In a WTO submission, Venezuela has also proposed the “development of multilateral competition rules” without any further elaboration as to the suggested content of the rules. See Communication from Venezuela, Preparations for the 1999 Ministerial Conference, Proposals Regarding the GATS Agreement (Paragraph 9(a)(ii) of the Geneva Ministerial Declaration), WT/HGC/W/281 (August 6, 1999). Turkey agrees that “a multilateral approach on competition would be helpful to achieve the objectives of the WTO,” and recommends that “future work should be focused on studies to reach a common understanding on the issue.” Moreover, “a multilateral framework of competition rules should include provisions for transitional periods . . . to allow Members at different stages of development to subscribe to the commitments. . . .” See Communication from Turkey, Preparations for the 1999 Ministerial Conference: Competition Policy, WT/GC/W/250 (July 13, 1999).



countries.<sup>217</sup> In its own individual submission to the WTO, Kenya noted that some developing countries view the inclusion of competition policy in the multilateral trading system as a way of “clipping the wings” of comparatively stronger firms of developing countries so that “they do not withstand the competition with the well established firms of the developed countries.”<sup>218</sup> Therefore, Kenya proposed that any multilateral competition regime should consist of a code of conduct for transnational corporations aimed at curbing unfair trade practices.<sup>219</sup>

South Africa has also proposed a thorough educational process that would take into account the “huge analytical demands on developing countries regarding the preparations of the next round” of negotiations. South Africa suggested this prenegotiation process should span at least two years with resources made available to developing countries to ensure meaningful participation in the formal negotiations.<sup>220</sup>

### *Business and Labor Viewpoints*

The U.S. and international business communities have commented on the appropriate role for the WTO regarding competition policy. In the United States, the Business Roundtable has consistently held that competition policy negotiations at the WTO are both “unnecessary and potentially counterproductive.”<sup>221</sup> According to the Business Roundtable, negotiations should not proceed in the absence of an international consensus on competition policy, uncertainty about the WTO’s institutional competence on competition policy matters, and the possibility that developing countries might use the negotiations to “disturb the carefully crafted multilateral balance embodied in the WTO Antidumping Code.” The organization said a more appropriate role for the WTO would be to establish a new work program to assist governments in framing competition policy issues, to act as an information clearinghouse, and to provide technical assistance.<sup>222</sup>

Both the U.S. Council for International Business and the International Chamber of Commerce believe that a basis has not yet been established for international agreement in the WTO on competition principles or rules. “Thus, consideration by the WTO Working Group of a dispute

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<sup>217</sup> See Communication from Kenya on behalf of the African Group, Preparations for the 1999 Ministerial conference, The Interaction Between Trade and Competition Policy, WT/GC/W/300, August 6, 1999.

<sup>218</sup> See Communication from Kenya, Preparations for the 1999 Ministerial Conference, Contribution to the Preparatory Process, WT/GC/W/233, July 5, 1999, at p. 9.

<sup>219</sup> *Id.*

<sup>220</sup> See Communication from the Republic of South Africa, WT/WGTCP/W/138, October 11, 1999, at 2, 4.

<sup>221</sup> See Business Roundtable Submission at 4.

<sup>222</sup> *Id.*, See also THE BUSINESS ROUNDTABLE, PREPARING FOR NEW WTO TRADE NEGOTIATIONS TO BOOST THE ECONOMY (May 1999).

settlement mechanism coupled with new international rules governing competition policy would be premature,” the USCIB’s president told the Advisory Committee. Both groups do support continued education in this area.<sup>223</sup>

Labor representatives have also been reluctant to support competition policy negotiations at the WTO at this time. In a presentation before the Advisory Committee, a representative of the AFL-CIO expressed skepticism about the value of WTO competition policy negotiations, arguing that an international consensus on competition policy does not exist and national policies are still too divergent to expect that there would be compliance with such rules.<sup>224</sup>

### *Other Expert Views*

Although the empirical work assessing the effect of private restraints on international trade flows is quite limited, the scholarly and expert commentary on the question of competition policy and its possible nexus to the WTO is extensive. Three of the more prominent approaches offered by and debated among these experts are summarized here.

**A MULTILATERAL ANTITRUST CODE:** Perhaps the most all-encompassing proposal that has been advanced in recent years is one calling for a world antitrust code, with substantive principles to be administered by a supranational competition authority. In 1993 a private group of 12 scholars and other experts meeting in Munich (the “Munich group”) proposed an International Antitrust Code, which would set out minimum standards to be incorporated into the WTO (as an Annex 4 Agreement). Those standards in turn would be enforceable in domestic jurisdictions by national enforcement agencies. Disputes would be adjudicated by a permanent international antitrust panel, operating as part of the new dispute settlement regime. The minimum standards would cover specified principles of competition law; national treatment; supervision of enforcement by an independent authority empowered to request domestic authorities and courts to initiate investigations; and intergovernmental dispute settlement procedures.

**CREATION OF NATIONAL COMPETITION REGIMES:** Another approach, akin to that being advanced by the EU, argues in support of WTO competition rules to support the development of structural features of competition regimes. Under this proposal, the WTO would establish a set of rules, subject to dispute settlement, that requires countries to enact national laws; allows for private suits; seeks to guarantee political independence of administrative agencies; promotes nondiscrimination; abolishes antidumping laws; prohibits strategic antitrust policy; provides procedural minimum standards for merger review; and expands cooperation between authorities.<sup>225</sup>

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<sup>223</sup> See USCIB Submission at 2. See also International Chamber of Commerce, Joint Working Party on Competition and International Trade, “Statement on Future WTO Work on Competition and Trade,” (Nov. 3, 1998).

<sup>224</sup> See Lee July 14, 1999 ICPAC Meeting Remarks at 15.

<sup>225</sup> See Khemani and Schöne.



GENERAL PRINCIPLES: Rather than a patchwork of competition-type undertakings in sectoral WTO agreements on the one hand or a binding set of competition rules on the other, several experts have advanced proposals that center on the development of new general principles at the WTO. In 1999, then-Deputy Secretary-General of the OECD, Joanna Shelton, suggested that the WTO could develop a set of “core principles,” both procedural and substantive, upon which there could be broad agreement.<sup>226</sup>

Parties would bind themselves to abide by the core principles, but the specific rules that they adopt for doing so would not be subject to dispute settlement. The multilateral approach should provide some nonbinding suggestions about possible common approaches to aid nations in designing and enforcing substantive criteria such as the tests to assess the legality of horizontal agreements, vertical restraints, abuse of dominance and proposed mergers.

Other experts have argued along similar lines that nations should negotiate a set of procedural rules or principles of competition policy and then make those rules an Annex 4 or plurilateral agreement that would not be subject to dispute settlement procedures at all.

Some experts have suggested that the central challenge to the WTO is to develop an antitrust market access principle as a correlative to the market access principle underpinning trade laws.<sup>227</sup> One formulation of this approach argues that such principles would imply a duty not to block access to markets by anticompetitive means. Each nation would be responsible for implementing this principle in its national laws. This duty would apply both to governmental and private restraints. This approach envisions that the formulation of a precise principle on anticompetitive market blockage would not be necessary because the proposal itself contemplates a choice-of-law principle: the law of the excluding nation would apply. Implementation would require that nations provide effective discovery, fair process, and sufficient remedies. National policies would have to be clear and nondiscriminatory. The WTO would be charged with monitoring whether nations were adopting and enforcing the principles. Remedies might include mandatory injunctions to implement the undertakings and could include fines and compensatory damages rather than retaliatory trade action.

Recently, a joint ABA Antitrust and International Trade Section Task Force produced a report considering the intersection of trade and competition policy. Without specifically offering a view on the appropriate role for the WTO, the thrust of that report urges governments to take action against private anticompetitive practices that restrain market access by foreign competitors in ways that substantially lessen competition in the markets within that government’s jurisdiction. The task force did not suggest that governments agree on the details of substantive antitrust law or procedure,

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<sup>226</sup> See Shelton, Competition Policy.

<sup>227</sup> See e.g., Eleanor M. Fox, *International Antitrust: Against Minimum Rules; for Cosmopolitan Principles*, 43 THE ANTITRUST BULL. 5 (1998); and Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 AM. J. INT’L L 1 (1997), who would do the same but would limit the scope to private restraints that unreasonably impair market access.

but rather that governments take actions consistent with the principles of national treatment and most-favored-nation treatment as well as provide a fair, transparent process, accessible to foreign companies, where complaints can be made of access-denying practices and a resolution will be reached within a reasonable period of time. The ABA took no position as to what, if any, dispute resolution mechanism should be established to deal with the situation where one country is aggrieved by another country's failure to take action against an access-denying private practice that substantially lessens competition.<sup>228</sup>

All of the approaches that focus on the development of new principles share a common interest in integrating antitrust into a larger market access framework rather than trying to maintain a strict boundary between private and public restraints.

### **The Seattle Ministerial and Its Treatment of Competition Policy**

As proved true for many issues on the agenda at the Seattle Trade Summit in December 1999, the treatment of competition policy was not fully vetted, and language in the draft declaration on competition policy did not represent consensus language.<sup>229</sup> Moreover, the position of all WTO members on the issue of competition policy and its treatment at the WTO has not been fully disclosed. However, USTR Charlene Barshefsky has suggested that the EU was virtually alone in its interest in global negotiations on competition policy. She has stated publicly that "efforts to launch negotiations will falter again if the EU insists on negotiations on investment and competition rules for which there had been no support among members. It was clear in the smaller Green Room

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<sup>228</sup> ABA REPORT ON PRIVATE ANTICOMPETITIVE PRACTICES at 109-110.

<sup>229</sup> The language that was produced for the negotiations and contained in the Draft Declaration as of December 3, 1999, reportedly stated:

"41. Building on the work done on the interaction between trade and competition policy, we agree to continue the educational and analytical work, based on proposals by Members. The issues on which this work shall focus shall include core principles of competition policy and of the WTO, approaches to anticompetitive practices of enterprises, appropriate modalities and support mechanisms for exchange of experience and other forms of cooperation, and measures to address the particular needs and situations of developing countries.

42. This work shall be purposeful and focused and aim to assist all Members to prepare for, and adequately assess the possible implications of negotiations on this issue.

A report on this work shall be presented to the Fourth Ministerial Conference, which shall decide whether specific guidance is needed for any negotiation to be launched at that time under the single undertaking."

As of this writing, the status of the WTO Working Group and the immediate next steps are unresolved.

See INSIDE U.S. TRADE, *Special Report*, December 10, 1999 at 10.



meetings at Seattle that full-scale negotiations on investment, competition policy, government procurement, and possibly other areas are not supported by the 'vast, vast, vast majority' of members."<sup>230</sup>

### **The Advisory Committee's Assessment on a Role for the WTO**

This Advisory Committee was not of an entirely shared view on the appropriate role for the WTO over time; however, unless otherwise indicated, the recommendations and perspectives that follow reflect consensus views.

The Advisory Committee believes that the two extremes of the spectrum described above do not offer realistic approaches to the complex problems associated with trade-distorting governmental and private restraints. Namely, this Advisory Committee sees efforts at developing a harmonized and comprehensive set of multilateral competition rules administered by a new supranational agency as not only unrealistic but also unwise. It is apparent that the laws of the industrialized countries have already converged to some extent, but the differences that remain are still substantial, and such differences are probably the most resistant to harmonization. Hence, there is limited likelihood of binding agreement on substantive standards except at the highest level of generality or perhaps with respect to hard-core cartels. This inability to reach convergence in approach as well as structure is even more severe where developing countries are concerned.

The Advisory Committee is not arguing against efforts at promoting soft convergence -- far from it; several proposals that this Advisory Committee believes would be useful efforts along those lines are discussed later in this section. However, deliberations and consultations on substantive as well as procedural features of competition policy regimes are different from the negotiation of a comprehensive international antitrust code. Even if a greater degree of formal harmonization of law than envisioned here were achievable, it is fanciful to imagine that jurisdictions with established competition policy regimes would be prepared to cede national authority to review cases that adversely affect them to a new supranational authority. To establish such a body requires a shared vision and commitment to economic integration that does not currently exist among nations.

The other end of this spectrum is equally untenable over the medium term. That is the proposition that purely national approaches are sufficient and that broader international engagement is not necessary. This viewpoint ignores both the costs of the current sources of disharmony among nations and, equally important, the opportunities that now appear to exist for productive collaboration among competition authorities as well as between trade and competition authorities, including at the WTO.

Hence this Advisory Committee believes that attention should be focused on the substantial middle ground, where there is a constructive role that the WTO can and should be encouraged to

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<sup>230</sup> See *INSIDE U.S. TRADE*, Vol. 17, No. 51, at 3, December 24, 1999.

develop with respect to competition policy. At the same time, the Advisory Committee members were not of a unanimous view about the role of the WTO regarding private restraints of trade, nor about whether new substantive or procedural obligations subject to dispute settlement might usefully be included in WTO rules.

This Advisory Committee recommends that the primary focus of the WTO and its area of core competence remain as an intergovernmental trade forum focusing on governmental restraints. A great deal of trade liberalization still remains to be accomplished, and much of that agenda can itself have a positive impact on the environment for competition policy around the world.

Because of the diversity of national experiences with competition laws and policies, the Advisory Committee has given considerable attention to whether the WTO could and should serve as an educational and deliberative forum on the full range of competition problems that exist in the world today. Clearly, many competition policy issues would benefit from expanded international consideration and deliberation. But, as this Advisory Committee has noted earlier, not all competition policy problems are trade problems, and simply because a practice is trade-related does not automatically mean that it should be subject to WTO rules or review.

The efforts of the WTO Working Group on the Interaction Between Trade and Competition Policy are promising, but not definitive. The activities of the WTO continue to evolve and the United States may be taking too narrow a view if it assumes that the WTO can serve *only* as a forum for the negotiation of rules that are subject to dispute settlement; it may be able to serve also as *a deliberative and educational body over time*. Competition policy issues that are fundamentally international in nature should be receiving attention in multiple international fora. Such discussion could lead to consensus on some points and at least to an improved understanding of differences on others. The momentum that has built in the WTO could be useful in this regard, and its potential should be developed. Hence, this Advisory Committee recommends that the U.S. government and the Department of Justice undertake efforts to nurture this role for the WTO, but to do so with modest expectations for the medium term and not to the exclusion of other international initiatives. Moreover, to the extent that the WTO appears to be able to focus usefully only on those features of a global competition policy agenda that are directly related to the trade and market access issues, then the Advisory Committee urges that other competition policy-centered initiatives be undertaken elsewhere.

The Advisory Committee further recommends that in the near term the U.S. government support and pursue additional incremental steps at the WTO to deepen the work already under way to understand the relationship between trade and competition policies and the effect on international markets of private and public restraints.

To this end, the Advisory Committee recommends several specific steps that could be taken, all of which are intended to make the WTO a more “competition policy friendly” environment. The most obvious step in this direction would be the continuation of the deliberations of the Working Group on the Interaction between Trade and Competition Policy. As noted earlier, that Working



Group has had a productive start, but it is still in its early stages of deliberations. The Working Group should develop an active work program and be the focal point for dialogue on issues where both trade and competition issues arise.

Additionally, the Advisory Committee recommends that competition policy expertise be expanded at the WTO and in the country missions, wherever possible. The WTO should conduct regular summary reports or review of those countries that have competition laws or policies in place. For example, competition policy could be made a regular element of the country reviews conducted under the Trade Policy Review Mechanism (TPRM), which provides a broad mandate for multilateral surveillance of members' trade policies and practices. Such reviews could consider national competition policies from the perspective of core WTO disciplines such as transparency, nondiscrimination and accountability; this type of peer review, currently undertaken with respect to some jurisdictions, would be consistent with the interest in the EU and the United States in seeing the development of transparent, nondiscriminatory competition policy regimes around the world.

While this Advisory Committee does not believe that the WTO should *oblige* countries to introduce competition laws, if countries choose to introduce such domestic policy measures then the WTO should be one of the institutions capable of supporting the development of sound competition policy regimes around the world consistent with these WTO principles.

Although U.S. and EU official views appear to be in tension on the specific question of whether the next round of multilateral negotiations should include negotiations of horizontal rules covering competition policies at the WTO, there seem to be points of agreement between the U.S. and EU in several other areas that this Advisory Committee believes offer the basis for constructive collaboration. For example, the EU and the United States are forceful advocates for bilateral cooperation agreement and have entered into a detailed and forward-looking bilateral cooperation agreements that can serve as a model for much of the rest of the world. Moreover, both jurisdictions have a shared interest in the development of sound competition regimes around the world, and both jurisdictions are putting considerable effort into technical assistance and institution building. The Advisory Committee urges the U.S. government to build upon these areas of overlapping interests, not only between the United States and the EU, but between and among all interested jurisdictions. Obvious areas include development of bilateral cooperation instruments, promotion of best practices in competition policy and its enforcement, and improving understanding on problems that transcend national boundaries.

*Private Restraints*

At this juncture, the majority of the members of the Advisory Committee believe that the WTO as a forum for review of private restraints is not constructive.<sup>231</sup> Governments have legitimate concerns about the ability as well as the appropriateness of the WTO in reviewing the decisions of their domestic regulatory authorities or the conduct of private business firms.

Even more fundamentally, trade policy may view a competition-market access problem differently than does competition policy. It is conceivable that private firms can engage in actions that inhibit access to the market for new and foreign entrants to the detriment of the international trading system. At the same time, such foreclosure may have other efficiency-enhancing features for domestic firms and the domestic economy and not be anticompetitive under local law. To say to the trade community that the foreclosure does not present a real market problem is just as unacceptable as to say to antitrust policymakers that its standards of law must shift in the context of international disputes to accommodate this perceived inequity. The notion of developing generalized principles enforced through national law are clearly an attempt to get at this dilemma.

That approach, however, poses somewhat different dilemmas: it may reduce the intrusiveness of WTO oversight of national judgements about private conduct, but it does not solve the likelihood that the principles will be very general and unable to provide a robust means of resolving concrete disputes among nations. Also, and importantly, the quid pro quo character of the WTO as a negotiating forum runs the risk of skewing points of emphasis in any competition policy agreement. Given these limitations, together with the more fundamental lack of international consensus on the appropriateness of rules or dispute settlement in this area, the majority of the Advisory Committee believes that the WTO should not seek to encompass new competition rules.

Although it is not a fully satisfactory solution in the near term, national authorities are best suited to address anticompetitive practices of private firms that are occurring on their territory. For this reason, and because there is no sound foundation of competition law and policy regimes around the world, efforts at this time should be focused on supporting and encouraging the development of such systems. If private business practices that restrict market access are occurring in a jurisdiction that does not have a competition law or the authority is unable or unwilling to remedy the problem, then the harmed nation may be able to apply its own laws extraterritorially. If relief is not practicable (perhaps because of an inability to obtain necessary evidence), then it may be the case that the harmed nation simply has limited relief available to it under the current system. This may be an appropriate subject of international consultation; it seems, however, less appropriately a matter for WTO dispute settlement.

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<sup>231</sup> Advisory Committee Member Eleanor M. Fox believes, to the contrary, that artificial public and private market-blocking restraints are two sides of one coin, and that nations should be held accountable for them in the context of the WTO. See Eleanor M. Fox, *International Antitrust: Cosmopolitan Principles for an Open World*, Chapter 16 in 1998 FORDHAM CORP. L. INST. (Barry Hawk, ed. 1999). See also her Separate Statement to this Report in Annex 1-A.



*Mixed Governmental and Private Restraints*

Over the longer term, the issue of restraints that stem from a mix of governmental and private conduct is closely tied to the conduct of governments; this is therefore an area where this Advisory Committee can envision that the WTO will be called upon to consider disputes between nations that hinge on whether private practices that foreclose access to markets are encouraged or supported by governmental practices. At a minimum, dissatisfaction by some parts of the international trade and business community is likely to continue to result in some interest in developing new tools or approaches (be such approaches unilateral or multilateral) to address mixed public-private restraints that are seen as undermining open markets. The effects of public sector regulatory measures on market access, especially if discriminatory though facially neutral, might also constitute a type of mixed public-private restraint and should be considered within this context as well. The WTO has already witnessed several trade cases that bear this profile. One can easily envision any number of circumstances -- and this Advisory Committee has certainly heard testimony from experts, executives and trade associations to this effect -- that suggest the problem of mixed public-private restraints is real and likely to recur as a source of tensions between nations.

The discussion in this Report has recognized that the WTO currently has several large loopholes that pertain to such practices. First, governments can avoid their open-market obligations by letting their firms close the market; in those circumstances the responsibility does not lie with the government, and hence the WTO has a limited, if any, voice on the matter. Second, governments may be able to avoid an obligation by showing that their restrictive measures were in place when, for example, lower tariffs were negotiated; therefore the complaining WTO member had no reasonable right to expect that the market would be free of the problematic restraints. Third, and perhaps most complex, where some part of the restraint is state-imposed or inspired and some portion is the result of firm practices, the system as it stands requires that any complainant elect to go forward under antitrust law or trade law. In so doing, the claimant, therefore, must prove two aspects of a problem under separate tracks, and the understanding of the problem can be diluted or seen as no problem at all.

The Advisory Committee believes that the anticompetitive closing of foreign markets is a significant disruption in the world trading system. It is important that international initiatives be undertaken that can help to resolve these problems. Several specific proposals are advanced in the chapter that follows, most notably the suggested creation of a new Global Competition Initiative.

As the world moves into the next century and new countries join the WTO, the problems of market access will surely deepen, and the line between public and private restraints will become increasingly opaque. Hence, it is a particularly important area of attention by trade and competition policymakers.

## **SUMMARY OF RECOMMENDATIONS**

The Advisory Committee believes that there is no single approach that responds to all aspects of competition problems facing the global economy and U.S. firms. Several different approaches may be promising. Bilateral agreements with positive comity offer a potentially useful instrument for addressing private restraints. The extraterritorial enforcement of U.S. antitrust laws can be necessary and prove effective under some circumstances. Importantly, in the view of this Advisory Committee, economic globalization requires the further development of international competition policy initiatives. Through certain adjustments in each of these approaches, United States policy can improve upon its approach to problems that intersect both trade and competition policy concerns.

### **Bilateral Agreements with Positive Comity**

1. The U.S. Department of Justice should build on the U.S. - EC positive comity agreement as a model for future agreements and should continued to expand the jurisdictions with which it enters into bilateral cooperation agreements.
2. It may be possible to improve upon the structure of positive comity provisions still further. The Advisory Committee proposes several specific recommendations to increase communication and transparency in the positive comity process.
3. In addition to visible support for positive comity by competition enforcement agencies, international organizations that address trade and competition issues also should endorse the benefits associated with positive comity in their mission. By advertising the advantages reaped from effective positive comity cooperation, international organizations hold the potential to expand such cooperation to nations or jurisdictions that have similar antitrust laws and enforcement policies.
4. As a means to ensure that aggrieved U.S. firms view positive comity tool as a serious policy option for addressing anticompetitive practices in foreign markets, the Department of Justice should make a conscientious effort to implement and test recent bilateral agreements with positive comity provisions as a first response to solve real problems, when meritorious cases arise.

### **U.S. Enforcement To Gain Market Access**

1. Although the Advisory Committee believes that the United States should develop incentives to obtain foreign authorities cooperation, U.S. antitrust laws should not be weakened in an effort to obtain such assistance. For example, the Advisory Committee believes in maintaining treble damage liability in cases where the only antitrust violation alleged is harm to U.S. export commerce.



2. Private and governmental litigation can raise traditional comity concerns on the part of foreign governments. Improvements should be sought in the process and standards by which competing interests are balanced for comity purposes. To that end, the Advisory Committee recommends that federal, state, and local judges hearing private disputes that raise claims or defenses based on considerations of governmental policy invite concerned governments, including the U.S. Department of Justice, to submit their views at an early stage in the litigation. Such “airing of views” commonly takes the form of *amicus curiae* submissions.
3. The Advisory Committee recognizes that U.S. extraterritorial antitrust enforcement against foreign market-blocking restraints is a sensitive issue for foreign governments that can affect antitrust enforcement cooperation efforts in particular and law enforcement cooperation more broadly. Because of these concerns and the potential obstacles discussed above, the expected results of extraterritorial enforcement against offshore restraints on U.S. exports should not be overestimated. *Indeed, it is for such reasons that the Advisory Committee recommends that a first step in attempting to address these restraints should be to consider whether it is realistic to approach the foreign nation where the practices occur and seek its cooperation.* Where such cooperation is not forthcoming, a willingness to use U.S. antitrust enforcement tools may have the salutary effect of acting as a lever to encourage excluding nations to pursue their own enforcement actions. A tenable U.S. antitrust enforcement effort against market-blocking restraints may contribute to a greater culture of cooperation and enforcement. *It is also essential to the credibility of U.S. antitrust enforcement that the business community have confidence that the Antitrust Division will vigorously pursue cases, including export restraint cases, wherever possible and when no superior alternatives (such as positive comity) are available.* Further, the Advisory Committee recommends that the U.S. antitrust agencies continue to have responsibility vis-à-vis trade agencies over legal determinations of the anticompetitive conduct of private firms, at home or abroad.
4. One of the most challenging aspects of U.S. enforcement against market-blocking restraints is developing adequate evidence of anticompetitive conduct. In any case that could result in an enforcement action, that information and analysis will be highly fact specific. Nonetheless, there remains considerable disagreement about the merits of particular disputes and the extent to which private, governmental, and mixed public-private restraints inhibit trade. It therefore may be useful to undertake some broader empirical analysis such as a study of the magnitude of global trade problems that stem from private or governmental restraints abroad or an analytical effort to evaluate the effects of recent transnational cases such as in the cartel area. Such a study would not establish definitive estimates, but it could provide a foundation of evidence or analysis for informed national decisionmaking and international discourse that could be updated, as needed.

## **The Role of International Organizations**

1. The Advisory Committee recommends that the primary focus of the WTO and its area of core competence remain as an intergovernmental trade forum focusing on governmental restraints. A great deal of trade liberalization has yet to be achieved and that agenda can itself have a positive impact on the environment for competition policy around the world.
2. The Advisory Committee also recommends that the U.S. government support and pursue additional incremental steps at the WTO to deepen the work already under way on the intersection of trade and competition policy. The WTO Working Group on the Interaction Between Trade and Competition Policy is a productive intergovernmental initiative engaging trade and competition officials from both developed and developing economies. To foster the work of this group, the Advisory Committee recommends the WTO undertake these illustrative and largely educative steps to make the WTO a more “competition policy friendly” environment.
  - The most obvious step in this direction would be the continuation of the deliberations of the Working Group, which has had a productive start but is still in the early stages of deliberations.
  - The WTO should increase the competition policy expertise at the WTO Secretariat and in the country missions, wherever possible.
  - The WTO should continue to conduct regular summary reports or review of those countries that have competition laws or policies in place, possibly including such reports in the Trade Policy Review Mechanism.
3. At this juncture, the majority of the Advisory Committee believes that the WTO as a forum for review of private restraints is not appropriate. Given the limited likely results, the risks and the lack of international consensus on the content or appropriateness of rules or dispute settlement in this area, this Advisory Committee believes that the WTO should not develop new competition rules under its umbrella. Various concerns animate the Advisory Committee’s skepticism toward competition rules at the WTO, including the possibility that the quid pro quo nature of WTO negotiations could distort competition standards; the potential intrusion of WTO dispute settlement panels into domestic regulatory practices; and the inappropriateness of obliging countries to adopt competition laws. While recognizing that in some instances it may not be a fully satisfactory result, the Advisory Committee believes that national authorities are best suited to address anticompetitive practices of private firms that are occurring on their territory.
4. If anticompetitive and market blocking practices are occurring in a jurisdiction that does not have a competition authority or that authority is unable or unwilling to remedy the problem,



then the harmed nation may be able to apply its own laws in an extraterritorial fashion. If relief is not practicable (owing to an inability to obtain necessary evidence or other means), then it may be the case that the harmed nation simply has limited relief available to it under the current system. This may appropriately be a subject of international consultation. However, it is less appropriately a matter for WTO dispute settlement.

5. Over the longer term, the WTO may be called upon to resolve disputes between nations that hinge on whether private practices that foreclose access to markets are ultimately attributable to governmental practices. The ability of the WTO to resolve such disputes is not fully tested under the WTO's existing rules or jurisprudence and is an area that this Advisory Committee believes needs particular study and consideration by trade and competition policymakers in the years ahead. As the world moves into the next century, and as new countries join the WTO, the problems of market access will continue, and the line between public and private restraints will become increasingly opaque. Hence, it is a particularly important area of attention by trade and competition policymakers.

## *Chapter 6*

### **PREPARING FOR THE FUTURE**

As noted at the outset of this Report, the Advisory Committee was invited to think broadly and boldly about new tasks and concepts that the United States and the international community should consider in addressing competition issues that are emerging on the horizon of the globalizing world. This last chapter looks at four of these areas. First it examines the Advisory Committee's perceived need for additional multilateral initiatives to deal with competition policy matters that either transcend national boundaries or that would benefit from more international attention. Chapter 5 explained why this Advisory Committee does not see the World Trade Organization (WTO) as the natural home for international discourse on the full range of competition policy matters. Here, we propose an important additional approach, the "Global Competition Initiative," to create a home for addressing the entire global competition agenda. Second, and closely related to the proposal for a Global Competition Initiative, the chapter considers the need for an international mechanism that would allow countries to resolve disputes over competition policy short of entering into binding mediation.

Third, the chapter considers an emerging issue of growing importance, namely, the intersection of competition policy and electronic commerce. At the same time that the expansion of electronic commerce is creating competition in many new markets around the world, it may also be raising new problems of relevance to competition policy. This chapter considers the types of competition problems that might arise as a result of rapid technological change and cyberspace. This discussion is more advisory than conclusory. The discussion of e-commerce is raised not only for its singular features but also as an exemplar of developments on the horizon that implicate both competition policy and the global economy. A few years hence, the market may produce another innovation with global ramifications akin to the emergence of e-commerce.

Finally, the chapter considers the configuration of U.S. foreign economic policymaking itself and the role that competition policy perspectives can play in that process. This Advisory Committee believes that there is both a need and an opportunity for competition policy to play a greater role in U.S. foreign economic policy. To do that effectively, some adjustments in the current structure and approach are required.

#### **EXPANDING THE DIALOGUE: A GLOBAL COMPETITION INITIATIVE**

All of the Advisory Committee's work made clear that the global community is increasingly focusing on international global competition problems but is not yet locked into any particular or even any group of institutions for holding talks on competition policy matters. The Advisory



Committee believes that makes this an opportune time to consider the optimal approach for holding such consultations and moving ahead.

In the Advisory Committee's view, the United States and other nations should continue to use -- but not be limited to -- existing international organizations and venues such as the WTO, the Organization for Economic Cooperation and Development (OECD), and the United Nations Conference on Trade and Development (UNCTAD), that have productive programs on competition policy under way. Indeed, the Advisory Committee recommends that the United States explore the scope for collaborations among interested governments and international organizations to create a *new* venue where government officials, as well as private firms, nongovernmental organizations (NGOs), and others can consult on matters of competition law and policy. The Advisory Committee calls this the "Global Competition Initiative."

As the Advisory Committee envisions it, the Global Competition Initiative should be inclusive in its membership, open to developed and developing nations, and comprehensive, or at least open to the possibility of breadth, in its coverage of issue areas; it should also allow room for the private sector, NGOs and other interested parties to play a role. The Initiative might take the form of a set of intergovernmental consultations akin to the meetings of the meetings of the senior economics ministers of the Group of Seven nations, known as the G-7, but with less formality and perhaps more frequency of meetings. Annual or semi-annual meetings as part of the Global Competition Initiative could be devoted to opportunities for antitrust officials to exchange views and experiences on anticartel enforcement, merger review, enforcement cooperation, analytical tools, technical assistance and other issues related to antitrust enforcement. The G-7 is an attractive model in that it demonstrates that countries can create mechanisms to exchange views and attempt to develop consensus on economic issues without investing in a permanent staff (although support from international organizations and governments would be necessary). This concept is not intended to create a new and extensive bureaucracy. Instead, its central ambition is to permit interested nations to start a process that can build over time.

The important point is to provide a forum where governments that support such a Global Competition Initiative could meet to take up an agenda that covers the full range of competition policy matters of consequence to the global economy. A modest effort at creating a "virtual organization" with minimal dedicated staff, support by participating institutions and governments, and regular meetings can make a strong contribution to the development of a competition culture and sound antitrust enforcement. The following discussion elaborates further on the Advisory Committee's recommendation.

### **Why This Global Competition Initiative Is Needed and What It Would Do**

All currently existing international forums that deal with competition policy matters have some inherent limitations. As discussed in Chapter 5, the WTO has an important role to play, but it also has limitations. Notably, the WTO is broadly inclusive in its membership, but it is centrally focused, and in the view of this Advisory Committee properly focused, on governmental restraints

with trade effects. Yet not all competition policy problems are trade problems. Harmonization of procedural or substantive features of merger notification and review and protocols to protect confidential information exchanged in the course of enforcement measures are broadly international, but they are not trade issues. Moreover, the traditional mandate of the WTO — negotiation of rules that are then subject to dispute settlement — may be inappropriate for competition issues, which instead need to be discussed broadly and in a consultative manner. Only a limited range of competition matters, if any, are likely to bear fruit in any organization that requires a binding commitment from nations. For all these reasons, it is not sufficient to consider new initiatives only at the WTO. Given the failure of the Seattle trade summit to reach agreement on an agenda for a new round of multilateral negotiations, it is also unclear how or whether competition policy will be considered by the WTO. Thus, for these and other reasons discussed in Chapter 5, adding the full competition policy agenda to the WTO may overburden it and, in the view of this Advisory Committee, is also seen as inappropriate.

The OECD for its part is a very important organization with respect to competition policy, but it too has limitations. The OECD has promoted international discussion of competition policy matters under its longstanding group, the Competition Law and Policy Committee (CLP,) as well as within a working group composed of members of this committee and the OECD's Trade Committee. These provide important venues for deliberations between competition authorities from the OECD's 29 member nations as well as between trade and competition authorities. The OECD has been the only international setting where governments have agreed on undertakings related to competition policy. It has also undertaken important analytical and policy-oriented studies of global competition problems. The CLP has worked particularly well as a forum for promoting soft convergence of competition policies among its members and for providing technical assistance to certain OECD observers and nonmembers. It has not, however, achieved much success in rulemaking or dispute settlement. Moreover, numerous jurisdictions that have competition laws or policies in place or that are considering the introduction of such policy measures are not members of the OECD. And the specialized needs of new competition regimes may not yet be fully integrated into the deliberations and analysis of the OECD.

To some extent, ad hoc initiatives of the sort envisioned by the Global Competition Initiative already do occur. For example, the U.S. Department of Justice recently hosted for the first time an international meeting of competition enforcement officials to discuss practical cartel enforcement matters, as discussed in Chapter 4. The German competition authority has also hosted several meetings of enforcement officials from around the world. Analogous initiatives are occurring in other areas. In 1998, for example, the OECD and the World Bank began a collaboration on corporate governance called the Global Corporate Governance Forum.<sup>1</sup> For its part the OECD developed a set of "best practices" principles on corporate governance, and now through the collaboration with the World Bank, the new initiative is sponsoring seminars, outreach, and many other consultative activities with governments and firms around the world.

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<sup>1</sup> Details on this program are available at the Forum's website at: <[www.gcgf.org](http://www.gcgf.org)>.



The logic behind this Advisory Committee's idea for a competition initiative stems in part from a recognition that countries may be prepared to cooperate in meaningful ways but are not necessarily prepared to be legally bound under international law. The Asia-Pacific Economic Cooperation forum (APEC) has been built on this recognition that "peer" pressure is capable of advancing some liberalization and harmonization of practices even without binding legal instruments. The proposed Global Competition Initiative is built on the premise that nations can usefully explore areas of cooperation in the field of competition policy and facilitate further convergence and harmonization. There may be areas where nations are prepared to develop binding agreements, and other areas where the development of nonbinding principles or consultations are more promising.

The reasons for undertaking such consultations will also differ from country to country. Officials from transition environments, for example, often remark that international agreements or consultations can be extremely important to "lock in" a reform agenda or secure added legitimacy for market-based reforms that face domestic opposition.<sup>2</sup> It is possible that an international initiative that explored the full range of competition law and policy matters could serve to reinforce the development of sound national competition regimes.

### **The Mission and Activities of the Initiative**

The point of this proposed Global Competition Initiative would be to foster dialogue among officials along with broader communities to produce more convergence of law and analysis, common understandings and common culture. Areas for constructive dialogue might include further discussions among competition agencies to:

- Multilateralize and deepen positive comity;
- Agree upon the consensus disciplines identified in Chapter 2 regarding best practices for merger control laws and develop consensus principles akin to the recent OECD recommendation on hard-core cartels; consider and develop disciplines to define actions of governments; for example in areas with negative spillover potential such as export cartels, which require broader international cooperation and consultation;
- Consider and review the scope of governmental exemptions and immunities that insulate markets from competition around the world (as discussed in Chapter 5);
- Consider approaches to multinational merger control that aim to rationalize systems for antitrust merger notification and review (as discussed in Chapter 3);

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<sup>2</sup> See e.g., Testimony of Anna Fornalczyk, President, Competition Development Center, Poland, ICPAC Hearings (Nov. 4, 1998), Hearings Transcript at 135-136; Testimony of Ana Julia Jatar, Senior Fellow, Inter-American Dialogue, ICPAC Hearings (Nov. 4, 1998), Hearings Transcript at 90.

- Consider frontier subjects that are quintessentially global such as e-commerce, which will create new challenges for policymakers around the world;
- Undertake collaborative analysis of issues such as global cartels (discussed in Chapter 4) and market blocking private and government restraints (discussed in Chapter 5); and
- Possibly undertake some dispute mediation and even technical assistance services.

As this list illustrates, the scope of the possible agenda for this Initiative is considerable; and the agenda would, of course, be driven by the interests of the participating governments. Some governments are likely to be interested in supporting the enforcement capabilities of national systems as well as fostering cooperation between authorities. Others may be interested in developing consensus on new areas where competition policy challenges are global and national responses are likely to be less than fully adequate.

Identification of this broad ambit of possible activities is not meant to suggest that such an Initiative needs to be born full blown with institutional features. Rather, it needs to grow naturally with the support of governments and international organizations, most critically, the WTO, the World Bank, the OECD and UNCTAD. Indeed, much of the analytical and deliberative dimensions outlined above build on approaches initiated at the OECD, which has established expertise and dedicated resources in many of the possible areas that could be considered by governments participating in the Initiative. As the corporate governance project described above indicates, such collaborations among government and international organizations do occur.

It is also important that a new international competition policy initiative not isolate competition officials from broader international trade and regulatory policy discussions. Indeed, the intended purpose here is to develop more coherence to competition policies around the world as well as to recognize even more fully the ways that private, governmental, and mixed governmental-private practices can affect national and international trade and economic well-being. Interaction with the WTO should be cooperative and reinforcing of shared objectives.<sup>3</sup> In a word, these various activities under the rubric of a new Global Competition Initiative should be seen as an effort to help prepare the groundwork at the multilateral level for more effective national enforcement and greater international cooperation.

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<sup>3</sup> This proposal is not altogether the first of its kind. For example, a group of international competition experts argued for the establishment of a small autonomous international Competition Policy Unit, located near the WTO and interacting with it to promote contacts, monitor convergence, help formulate competition policies for countries that do not have them, provide ways and means to deal with global effects of anticompetitive practices of enterprises and, in due course, undertake active multilateral negotiations about possible convergence of international competition policy standards. See A. Jacquemin, P.J. Lloyd, P.K.M. Tharakan and J. Waelbroeck, *Competition Policy in an International Setting: The Way Ahead*, in 21 THE WORLD ECONOMY at 1179-1183 (1998).



## INTERNATIONAL MEDIATION OF COMPETITION POLICY DISPUTES

In this Report, the Advisory Committee recommends against the development at this time of competition rules subject to dispute settlement procedures at the WTO. The Advisory Committee recognizes, however, that this position can leave some disputes, especially those surrounding perceived market access barriers stemming from some mix of private and governmental practices, without an established method of resolution. While extraterritorial antitrust enforcement can play a meaningful role to address some private anticompetitive practices abroad, litigating a particular case can often present insurmountable legal, practical, and political difficulties. Moreover, as described in Chapter 5, while bilateral agreements with positive comity are an important development, the use of this tool is still in its early stages. Even more complicated are those disputes that center on what the Advisory Committee has called mixed governmental-private practices and perceived nonenforcement of national competition laws. Thus, nations at odds about the spillover effects of practices occurring in one jurisdiction on others can be left without workable tools to address such problems. This is likely to be less true for powerful economies than for small ones, but to varying degrees it is still a problem for all nations.

Consequently, some consideration and experimentation with approaches is needed to provide options to resolve conflicts other than domestic litigation against a sovereign State, brinkmanship, or diplomatic negotiation. One possible approach is to create a mediation mechanism in which neutral parties can help the parties reach a settlement and where no party to a dispute enjoys any home-court advantage.<sup>4</sup>

Attempts thus far to develop a mediation or arbitration mechanism have been unsuccessful. A 1986 recommendation by the OECD Council attempted to establish procedural arrangements to avoid or minimize conflicts between trade and competition policies and provided an OECD consultation mechanism for parties in dispute. The Recommendation provides that "where the governments of the Member countries concerned agree, the consultations could be a matter for report and discussion within the Committee of Experts on Restrictive Business Practices, in close cooperation with the Trade Committee."<sup>5</sup> To date, however, the OECD mechanism has never been used. One potential stumbling block to its use may be the requirement that both parties to a dispute must agree to initiate the consultation process. There are a variety of reasons why either party to a dispute might wish to avoid mediation. The country where the problems are perceived to exist may not wish to submit itself to the judgment of a Committee of Experts. Similarly, the country that is making the complaint may be wary that the Committee of Experts might also consider the complainant's domestic practices, perhaps at the instigation of the other party to the dispute. Either

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<sup>4</sup> For a discussion of a similar concept, albeit with more legal formality than that envisioned by the Advisory Committee, see Andrea Giardina and Americo Beviglia Zampetti, *Settling Competition-Related Disputes: The Arbitration Alternative in the WTO Framework*, JOURNAL OF WORLD TRADE, December 1997.

<sup>5</sup> Recommendation of the Council for Cooperation between Member Countries in Areas of Potential Conflict between Competition and Trade Policies, October 23, 1986, C(86)65.

party may feel that the process of mediation can become highly politicized and therefore not facilitate actual resolution of the conflict. Adversarial dispute settlement is also a bit at odds with the consensus-building orientation of the OECD. Whatever the reasons, as currently structured the OECD consultation mechanism has not provided any incentives and perhaps has even offered disincentives for parties to utilize its procedures.

The Advisory Committee recommends that the U.S. government and other interested governments and international organizations consider developing a new mediation mechanism as well as some general principles that might govern how international disputes, at least sovereign competition policy disputes, might be evaluated under such a mechanism. This mechanism could be developed under the auspices of the proposed Global Competition Initiative or elsewhere. One possible format that might facilitate the use of such a mechanism is as follows: either party to a dispute could invoke an international panel of competition experts that would issue a report but would not require a co-equal examination of the petitioner's practices. The members of the panel would be drawn from a roster of internationally respected antitrust and competition experts.

Clearly such a mechanism would face many challenges. For example there would have to be agreement on the underlying problems that are reasonably before the expert panel or at least on an understood frame of reference. Other issues to be resolved include whether the mediation would encompass only governmental practices or some mix of governmental and private practices; how the panelists would obtain necessary evidence; and how timing issues might be addressed if disputes regarding mergers were involved. Despite these obvious complexities and there are doubtless others, the Advisory Committee believes that a report from an expert panel considering the facts of a dispute between nations might add a useful expert opinion for the affected parties and the global community. Much, of course, would hinge on the credibility of the expert panel and the availability of information sufficient to provide an informed basis for expert analysis.

### **ELECTRONIC COMMERCE AND COMPETITION POLICY: A NEW FRONTIER**

One area where technology has sparked explosive potential growth is electronic commerce (e-commerce). E-commerce offers tremendous opportunities for cost savings, increased consumer choice, and improved consumer choice. Businesses in virtually every sector of the economy are using the Internet to cut the cost of purchasing, manage supplier relationships, streamline logistics and inventory, plan production, and reach new and existing customers more effectively.<sup>6</sup> E-commerce can diminish the impediments associated with traditional geographic barriers and can provide consumers with an unprecedented ability to gather information, compare prices and satisfy individual preferences.

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<sup>6</sup> See U.S. DEPARTMENT OF COMMERCE, *THE EMERGING DIGITAL ECONOMY* (1998) at 5, available at [www.ecommerce.gov](http://www.ecommerce.gov).



Competition policy can play an important role in ensuring that consumers gain the benefits of this new technology and protect against those who might seek to suppress the development of e-commerce to protect their traditional advantages or alternatively use this technology to engage in anticompetitive conduct. As Joel Klein, the Assistant Attorney General for Antitrust, has stated, "there is nothing so different about these new technology-based markets that could possibly support abandoning this Nation's longstanding belief — a belief based on lots of experience — that competitive markets work best for consumers and [that] antitrust enforcement is essential for sustaining markets."<sup>7</sup>

The growth of Internet-based electronic commerce is occurring so rapidly that the likely business and policy consequences are just beginning to be understood. Not surprisingly, scholarship is limited on the implications of e-commerce for competition policy. Many experts have predicted that e-commerce will alter the market structures of several industries over time. At the moment electronic commerce appears to be creating opportunities for increased competition in some markets previously insulated by private barriers or distribution barriers. Some have even argued that the need for antitrust law in the e-commerce field is reduced or even eliminated because cyberspace provides a model of perfect competition with its low barriers to entry.

While this expansion of electronic commerce can create many procompetitive effects, it also has raised issues as to whether existing antitrust law is adequate to meet the challenges of dynamic change occurring as a result of electronic commerce. Indeed, Federal Trade Commission Chairman Pitofsky has noted that some have questioned "whether antitrust principles, developed primarily in the context of smokestack industries, should apply comparably and with equal force to new problems that emerge in connection with high-tech industries." However, Pitofsky cautions that, "abandoning antitrust principles in this growing and increasingly important sector of the economy seems like the wrong direction to go."<sup>8</sup>

The Advisory Committee agrees that cyberspace will undoubtedly increase market-based competition. However, the need for antitrust enforcement will remain important as some firms may try to use anticompetitive practices to forestall competition from new e-commerce entrants or,

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<sup>7</sup> Joel I. Klein, Assistant Attorney General for Antitrust, U.S. Department of Justice, *The Importance of Antitrust Enforcement in the New Economy*, Address before the New York State Bar Association, Antitrust Law Section Program (Jan. 29, 1998).

<sup>8</sup> Robert Pitofsky, Chairman, Federal Trade Commission, *Antitrust Analysis in High-Tech Industries: A 19<sup>th</sup> Century Discipline Addresses 21<sup>st</sup> Century Problems*, Address before the American Bar Association Section of Antitrust Law's Antitrust Issues in High-Tech Industries Workshop (Feb. 25-26, 1999). Additionally, in 1996, the Federal Trade Commission staff issued a report, "Anticipating the 21st Century: Competition Policy in the High-Tech, Global Marketplace," which examined changes in business conduct and transactions in response to global and innovation competition. The report, based on two days of hearings in late 1995, argued that core aspects of antitrust continue to serve the United States well.

alternatively, firms that use e-commerce may still have opportunities to exploit their market power and engage in anticompetitive activities.

In thinking about the global challenges to competition policy in the next century, the Advisory Committee identified e-commerce as an important frontier issues. To identify aspects of e-commerce relevant to competition policy, the Advisory Committee formed an E-Commerce Subcommittee, which in turn organized a roundtable of leading executives and thinkers in electronic commerce and information technology. What follows is a brief recounting of the issues considered through this and other outreach activities. It does not purport to be a comprehensive treatment of the subject, but simply attempts to identify some issues that policymakers and the public will need to consider in the years ahead. Three areas may warrant particular attention: *Traditional antitrust problems*, such as cartels, price signaling, anticompetitive tying of sales and other violations of traditional antitrust law, that could in fact occur in an e-commerce–high technology environment and could involve firms across jurisdictions; *potential network effects* that could lead to a monopoly or concentrations on a global scale, with corresponding opportunities for abusive practices by a monopolist; and *hidden mercantilism*, in the form of new or increased interventions or restraints by governments or firms, that could potentially reduce competition in national or global markets and harm both consumers and producers. These three areas are briefly considered below.

### **Traditional Antitrust Problems**

The development of e-commerce may give rise to certain patterns of conduct that present traditional antitrust concerns and require antitrust enforcement to ensure that consumers reap the benefits of e-commerce. For example, traditional distributors could attempt to organize a horizontal boycott to stop dealing with Internet competitors who are more efficient and more aggressive in pricing. Competitor collaborations, exclusive dealing on the Internet, and manufacturer nonprice restrictions on Internet distribution are other traditional antitrust issues that might recur in the e-commerce context.<sup>9</sup> Thus far, there has been no indication that the development and growth of electronic commerce will inhibit the ability of antitrust law and tools to protect consumers from these traditional antitrust problems. Indeed, the Department of Justice has brought several recent enforcement actions that aim to protect competition in the e-commerce marketplace.<sup>10</sup>

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<sup>9</sup> See David A. Balto, Assistant Director, Office of Policy and Evaluation, Bureau of Competition, Federal Trade Commission, “Emerging Antitrust Issues in Electronic Commerce,” Before the 1999 Antitrust Institute, Distribution Practices: Antitrust Counseling in the New Millennium, Columbus, Ohio (Nov. 12, 1999) at 10, 11-12 [hereinafter Balto].

<sup>10</sup> See e.g., U.S. Department of Justice Press Release 98-329, “Justice Department Clears Worldcom/MCI Merger After MCI Agrees to Sell its Internet Business,” (July 15, 1998); Justice Department Press Release 98-348, “Justice Department Sues to Block Citicorp’s Acquisition of Transactive Corporation Assets: Deal Would Eliminate Competition in Electronic Delivery of Welfare Benefits,” (July 27, 1998), U.S. Department of Justice Press Release 98-536, “Justice Department Sues Three Firms Over Auction Practices: Coded Bids Used to Signal Competitors,” (Nov. 10, 1998).



Emerging technologies may offer firms new mediums in which to attempt to engage in activities that amount to traditional antitrust violations; e.g., collusive agreements to restrict output or raise prices, price signaling, and anticompetitive tying of sales. For example, the heightened availability of electronic channels for communication between companies may increase the potential for conspiracies arising from illegal information exchanges between companies. Although these new technologies may pose new challenges to enforcement of competition policies, there is no reason to assume that traditional competition policy analysis is insufficient. Indeed, some cases have already surfaced. An allegation concerning use of electronic communications to facilitate collusion arose in the early 1990s, and the matter was handled with traditional antitrust tools.<sup>11</sup> More important, the detection and investigation of the issue was in fact aided by the electronic medium in which the communications occurred. Indeed, electronic commerce may make it easier to detect conspiracies executed through electronic means that can create records that are difficult to destroy.

Antitrust enforcement in electronic commerce markets may face difficult jurisdictional and definitional questions. Because e-commerce on the Internet is borderless in nature, jurisdictional questions regarding application of specific laws are inevitable.<sup>12</sup> Jurisdictional issues merit substantial debate and consideration as electronic commerce becomes an increasingly important component of cross-border commerce.<sup>13</sup>

## **Network Effects**

Network effects can occur when products are more valuable to purchasers or consumers the widely they are used. Such effects can arise in two ways: in "real" networks such as telephones or the Internet, network effects come from interconnection or interoperability. For example, a single telephone is more valuable if everyone else has a phone that can be accessed by that phone. In "virtual" networks, network effects arise because, as the number of users of a product or service increases, there is an increase in the number of complements available in the market for that product or service.<sup>14</sup> Thus, when a product achieves dominance, producers of complementary products (such

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<sup>11</sup> See *United States v. Airline Tariff Publishing Co.*, Civ. No. 92-2854, 59 Fed. Reg. 15,225 (Mar. 31, 1994).

<sup>12</sup> Companies may hesitate to compete to the fullest extent by using electronic commerce because they are unsure which jurisdiction's laws apply. For example, if information is created in one country, but accessed by consumers in another country, which laws apply? Few regulators have clarified whether and how their jurisdiction extends to the Internet. The EU, however, recently has begun discussions regarding possible modifications to international law agreements governing contract law and jurisdictional issues. Proposals have been submitted to alter the Brussels Convention to permit a consumer to sue a business in the consumer's home country, regardless of where the business is actually located.

<sup>13</sup> For an argument that the Internet is changing international law, see Henry H. Perritt, Jr., *The Internet is Changing International Law*, 73 CHI-KENT L. REV. 997 (1998).

<sup>14</sup> See A. Douglas Melamed, Principal Deputy Assistant Attorney General for Antitrust, U.S. Department of Justice, Network Industries and Antitrust, Address before The Federalist Society Eighteenth Annual Symposium on Law and

as software firms that write programs for a dominant operating system) overwhelmingly tailor their products so that they are usable only with the dominant system.

The Advisory Committee has discussed the possibility that high technology and e-commerce markets may encourage the development of network effects on a global scale that could then lead to monopoly and opportunities for abusive practices by a monopolist. Internet and e-commerce technologies may be susceptible to network effects to such an extent that the “winner takes all,” a situation in which the winner’s technology is the dominant technology, potentially even worldwide. Because the cost of switching to a different technology in e-commerce and high technology markets can be prohibitively high, monopolies can be difficult to displace. Competition agencies may need to pay particular attention to questions related to open architecture and contestability.<sup>15</sup> The issue of network effects also raise questions regarding the application of antitrust laws to international mergers between high-tech companies.

In industries characterized by network effects, a dominant standard often emerges. From an antitrust perspective, this can be problematic because once a dominant standard has been created in these industries, it can be difficult to reestablish a competitive structure, without risking fragmentation of the standard and a potential reduction in consumer welfare. Given the relative infancy of high tech and e-commerce developments, however, this Advisory Committee is not offering any judgments as to the extent to which network effects will prove to be a problem.

### **Hidden Mercantilism**

Despite the many pro-competitive effects of electronic commerce, the Advisory Committee believes that the potential for market insulation may inhibit the ability of both foreign and domestic companies to do business on the Internet and may impede competition and entry into foreign markets. Such constraints could take the form of hidden mercantilism — overly broad government-initiated regulation or industry standard setting that could produce the hybrid-type restraints previously discussed within this report. In addition, significant regulatory differences among countries could deter e-commerce firms from entering some markets. Competition enforcement authorities and consumer protection regulators must communicate and cooperate to ensure that the natural tension between appropriate economic regulation and consumer protection regulations do not harm competition. Such discussions could take place on a bilateral or multilateral level. Already, the WTO, the OECD and other intergovernmental organizations have formed working

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Public Policy: Competition, Free Markets and the Law (Apr. 10, 1999) at 1-2.

<sup>15</sup> Open architecture refers to the freedom of potential competitors to utilize the dominant network or standard. Similarly, a “contestable” market is one that is characterized by very low barriers to entry by new sellers. See Edward M. Graham and Robert Z. Lawrence, *Measuring the International Contestability of Markets*, 30 JOURNAL OF WORLD TRADE 5 (Oct. 1996).



groups on e-commerce.<sup>16</sup> A number of international business discussions of e-commerce are also underway.<sup>17</sup>

Market insulation could potentially take a variety of forms. It could, for example, result from restrictive regulation of advertising on the Internet. Laws that prohibit certain competitive practices, such as comparative or price advertising, could be used to ban websites that would compete with local businesses. In short, countries must take care in their regulation of electronic commerce.<sup>18</sup> And while governments have many legitimate areas of concern, it is also important that protectionist regulation not be introduced in the guise of sound public policy.<sup>19</sup>

### **Alternative Approaches for Policymakers to Consider**

The Advisory Committee does not feel it is appropriate to offer specific recommendations at this time. However, at Committee meetings a number of approaches were recommended that the United States could take on its own or in collaboration with foreign governments and international

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<sup>16</sup> In September 1998, the WTO established a work program to examine all trade-related issues relating to global electronic commerce and asked several WTO bodies to offer input including the Council for Trade in Services, the Council for Trade in Goods, the Council for TRIPS, and the Committee for Trade and Development. Work Programme on Electronic Commerce, WTO, WT/L/274, September 30, 1998. The OECD's objectives in electronic commerce revolve around four themes: building trust in the new electronic environment among service providers, users and consumers in electronic systems and transactions; minimizing regulatory uncertainty; ensuring access to the information infrastructure, and easing logistical problems for payment and delivery. OECD Electronic Commerce Objectives available at <http://www.oecd.org/dsti/sti/it/ec/index.htm>.

<sup>17</sup> Business groups such as the Transatlantic Business Dialogue (TABD) and the Global Business Dialogue on Electronic Commerce have also formed e-commerce working groups. The TABD Working Group on E-Commerce has recommended that all players in e-commerce embrace new approaches to: regulation, intellectual property and liability, taxation, consumer conduct and competitiveness. See TABD, 1999 Berlin Communiqué at 50-58. The Global Business Dialogue on Electronic Commerce (GBDe) was formed in 1998 to address electronic commerce issues of common concern to the business community including taxation, tariffs, intellectual property rights, encryption, authentication, data protection and liability. See GBDe Outreach letter from Thomas Middelhof, August 28, 1998 available at <http://www.gbde.org/gbde.html>.

<sup>18</sup> Advisory Committee Co-Chair James F. Rill believes e-commerce has broad dimensions and significant importance to global competition. The growth of e-commerce virtually defies quantification. The threat of seriatim balkanization of e-commerce by multiple, inconsistent, and uncoordinated national regulators threatens economic growth and can be used to impair competitive entry and expansion. The OECD Council recently approved consumer protection guidelines for e-commerce. One need not endorse all elements of the guidelines to acknowledge and exhort efforts be taken to achieve rational convergence of regulatory policies affecting e-commerce.

<sup>19</sup> Some members of the Advisory Committee have suggested that one possible model for handling the differences between disparate regulatory regimes and approaches may be the safe harbor negotiations between the United States and the EU over privacy. Under this proposed approach, the parties agree that if producers or service providers in the United States meet specific industry standards, a safe harbor is created so that the EU regulations will not create an impediment to U.S. companies operating freely in the EU market place.

organizations. These approaches are not mutually exclusive. One possible approach is to *do nothing*. Advocates of this perspective might argue that because the e-commerce/high technology sector is contributing so greatly to increased market-based competition around the world and markets are changing so very rapidly, government antitrust interventions could be erroneous and are likely to be slow-moving. By this logic, government action may offer little to and could detract from the development of e-commerce–high-tech markets. Another approach would *adopt an international rule or principle* against excessive government restraints and government toleration of private restraints that chill e-commerce competition. This approach would at least ensure that government actions are open to challenge. The United States could also *open conversations* (but not negotiations) with other nations to deepen our mutual understanding of the evolving problems with e-commerce. Discussions could cover whether a more elastic, dynamic understanding of antitrust harm is needed and whether firms should be obliged to ensure open architectures. A more ambitious approach would be to *negotiate an international agreement* to address potential competition problems in e-commerce.

U.S. policymakers might also consider whether new domestic policy approaches are necessary. At some point, it may be necessary to examine whether it is worthwhile to *introduce new legislation* to address the new problems. Antitrust enforcers could adopt *policy guidelines* that take account of the issues identified above. Alternatively, existing guidelines on mergers, international operations, and technology licensing, as well as the pending draft FTC joint venture guidelines, might be amended and extended to those sectors.

In summary, electronic commerce offers great potential for increased domestic and international competition. At the same time, firms and governments will have opportunities to use these new mediums to engage in anticompetitive practices that limit choice and hurt consumers. While traditional antitrust tools appear fully adequate to address “e-collusion” such as online cartels, price signaling, and other traditional antitrust concerns, the application of antitrust tools to network effects in this medium deserves review and scrutiny as these markets develop. While nations have legitimate regulatory concerns in the development of electronic commerce, it is important that governments tailor their regulations in a manner that does not stifle innovation, favor domestic firms or disadvantage consumers. As this discussion has illustrated, few issues in e-commerce are likely to be resolved satisfactorily through national initiatives alone, and many matters require international discourse and cooperation. This Advisory Committee encourages the U.S. government to lead in this effort by developing new channels of communication with governments, such as in the context of the proposed Global Competition Initiative, as well as using existing international forums, such as the OECD and the WTO, among others. Clearly, this area of economic activity will require ongoing attention in the years ahead.



## THE ROLE OF COMPETITION POLICY IN U.S. FOREIGN ECONOMIC POLICY

Throughout this report, the Advisory Committee has recommended steps that the United States might take to improve its own antitrust policy and encourage international coordination and cooperation on competition policy issues. Here, the Advisory Committee examines the role of the Justice Department, Antitrust Division, in shaping U.S. foreign economic policy.

Competition policy can be a force for open and competitive markets. The United States is properly proud of being the leading advocate and exemplar of economic policies that promote consumer welfare with minimal state interference. Yet, for a variety of reasons, the Antitrust Division of the Department of Justice has not traditionally played a central role in deliberations on U.S. foreign economic policy nor seen its role as broadly international in nature. Globalization is changing the economic reality if not the existing bureaucratic structures.

The role of U.S. antitrust authorities in the current economic policymaking structure appears ad hoc, the result of the interests and initiative of energetic individuals rather than an approach to policy making that integrates antitrust into all relevant deliberations on matters of foreign economic policy. For example, no antitrust official is a permanent participant in the subcabinet level deliberations on foreign economic policy or in the deliberations that occur, as currently configured, at the National Economic Council (NEC).<sup>20</sup> Antitrust authorities have been involved on occasion in deliberations involving competition policy concerns, but it appears that the antitrust agencies are more on the periphery of interagency policy making than at its core.

Some former U.S. officials have expressed the view that this state of affairs is just as it should be. They argue that the central role of the Department of Justice, Antitrust Division, is that of a law enforcement agency and that more risks than rewards are associated with being part of interagency deliberations on broad economic policy matters. By this logic, involving the Antitrust Division in broader economic policy deliberations runs the risk of distorting the its law enforcement role with other policy considerations.<sup>21</sup> Put differently, antitrust policy has worked hard to achieve a degree of independence from the interagency process; more active participation in that process increases the risks of politicization without a guarantee of commensurate benefits.

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<sup>20</sup> Douglas Rosenthal, former Chief of the Antitrust Division's Foreign Commerce Section, has written critically of the lack of a competition perspective in the development of foreign economic policy. See Douglas Rosenthal, *Equipping the Multilateral Trading System with a Style and Principles to Increase Market Access*, 6 GEO. MASON L. REV. 543 (1998).

<sup>21</sup> Daniel Tarullo, a former NEC official with responsibility for international economic affairs, made this point at the American Bar Association Section of Antitrust Law Advanced International Antitrust Workshop, January 14, 1999. Advisory Committee Member Thomas Donilon and Advisory Committee Co-Chair Paula Stern agree with this perspective.

Some members of this Advisory Committee are also concerned that the participation of antitrust officials in deliberations on matters broader than antitrust enforcement runs a risk of politicizing antitrust decision making which can erode the independence of the enforcement agencies and undermine the integrity and the neutrality of U.S. antitrust law and policy. To minimize the opportunities for such interventions to occur, antitrust officials should surely refrain from intervening in international economic policy matters that do not directly implicate competition policy. Indeed, comity can be important even in domestic interagency matters.

It is probably also true that the trade agencies and indeed most regulatory agencies have better developed constituencies on Capitol Hill and in U.S. corporate boardrooms than does the Antitrust Division or the Department of Justice. Support for antitrust in the United States is broad but shallow. In times of economic uncertainty, protecting domestic players is likely to be a more popular and reassuring response than an approach that promotes competition. The United States has a good record of mostly choosing the latter approach.

This Advisory Committee agrees strongly with the premise that the law enforcement dimension of antitrust must properly remain outside of the deliberative interagency process. It is important to the integrity of U.S. antitrust enforcement that this remain the case. Some distance from the political process is necessary if antitrust officials are to argue that they are focusing on competitive outcomes and consumer welfare interests rather than domestic firms or any particular outcome.

At the same time, some members of this Advisory Committee believe that the segregation of functions should not preclude the Department of Justice, Antitrust Division, from having a voice in economic decisionmaking, both domestic and international, of relevance to competition policy. Competition policy advocacy does not have to be public or even contentious. It should be (mostly) achievable outside the glare of publicity and within the councils of the Executive Branch. Hence, the challenge is to ensure that U.S. economic policymaking structures assure the means for developing a sound, consistent competition policy but avoid distorting the law enforcement role of the Antitrust Division.

This balance of engagement on broad economic policy matters on the one hand, and separation of its specific enforcement agenda on the other, has been struck at various points in the past. A notable example where competition policy has been integrated into U.S. foreign economic policy occurred during the U.S.-Japan Structural Impediments Initiative (SII) that operated between 1989 and 1992. During that period, the Antitrust Division was a full member of the subcabinet level group of senior officials in both the United States and Japan who participated in the process. This collaboration helped to foster not only productive interaction between the Department of Justice and the U.S. trade agencies (notably USTR and the Department of Commerce), but it also demonstrated that the Justice Department's agenda had the full support of the U.S. government, thus enhancing the credibility of the initiative in the eyes of the international community.



Several members of the Advisory Committee believe that it is important that senior officials from the Antitrust Division participate in all domestic and foreign economic policy deliberations that implicate competition policy. In the current administration, many of the key interagency deliberations over foreign economic policy appear to occur at the National Economic Council and at the subcabinet level. The chief antitrust enforcer in the Department of Justice is at the level of an assistant attorney general, however, and because of the imbalance in rank may not automatically be included in those deliberations.<sup>22</sup>

In the context of international negotiations or consultations, a further constructive step that could be taken is to ensure that the Antitrust Division, working in close consultation with the Federal Trade Commission, is the lead negotiator on any international discussions on competition policy, be they multilateral, bilateral, or regional. This approach has successfully been applied in other international negotiations, such as those involving financial services and securities, among others. This proposal is not, however, intended to suggest that by virtue of such participation or responsibility that the antitrust agencies should have any added authority with respect to non-competition matters in interagency deliberations of broad policy matters.

### **Expanding the U.S. Profile in International Competition Policy**

The Advisory Committee has also considered affirmative steps the United States could undertake to enhance its role in providing technical assistance to other jurisdictions. Chapter 4 discusses some approaches to technical assistance that may offer positive incentives to cooperate on antitrust enforcement, rationalization of law, and resolution of problems, among other matters, and the Advisory Committee recommended that some funding derived from fines in cartel prosecutions be devoted to international initiatives.

The Advisory Committee recommends further that the U.S. government extend and deepen its technical assistance programs directed at supporting the sound development of competition policy regimes around the world. Accordingly, the Advisory Committee urges the U.S. government to undertake new initiatives bilaterally, consider new forms of outreach, and consider new or expanded collaborations between U.S. agencies and other bilateral agencies or multilateral organizations, such as the OECD.

One way to do this would be to allocate additional resources to support capacity building in competition policy in transition and developing environments. Support for technical assistance programs has been a small but important component of the U.S. antitrust authorities' enforcement

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<sup>22</sup> Advisory Committee Co-Chair James Rill believes that elevation of the Assistant Attorney General for Antitrust would be a constructive step to enhance the likelihood of full and effective participation in deliberations of foreign economic policy of relevance to competition policy.

cooperation work over the past decade.<sup>23</sup> To date, U.S. antitrust authorities have provided technical assistance under programs characterized by modest funding support, geographical limitations, and varying duration or scope.<sup>24</sup> U.S. antitrust technical assistance funding levels reflect several factors, including the prioritization of competition law programming by the U.S. Agency for International Development (USAID) and Congress, the pace of requests for assistance from foreign governments, and the antitrust agencies' capacities to staff technical assistance missions.<sup>25</sup> Support peaked in connection with the congressionally mandated and funded program created to assist Central and Eastern European countries;<sup>26</sup> it is currently being increased to expand technical assistance to countries in Latin America in conjunction with broader U.S. government goals in the context of the Free Trade Area of the Americas.<sup>27</sup>

The Advisory Committee advocates application of an even broader view of U.S. priorities. Technical assistance to foreign competition agencies provides the United States with an opportunity to promote the adoption of sound competition principles and the rule of law. Technical assistance can be used to convey practical experience and advice to dozens of emerging antitrust regimes, as well as to provide guidance on formulating domestic competition policies that make sense in the globalized economy. Support of new competition policy regimes also gives the United States an

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<sup>23</sup> See Annex 6-A hereto. There are other sources of technical assistance globally. The Advisory Committee conducted an outreach effort through which it received submissions with information on a number of technical assistance programs organized over the past decade that were undertaken by or, in some instances, benefitted: Australia (funded by AusAID); Germany; the European Commission (through TACIS and Phare programs); Japan; Korea; Mexico; Poland; Spain; the United Kingdom (funded through their Know-How Fund); the United States (through the Department of Justice and FTC programs, among others, and funded by U.S. Agency for International Development); Venezuela; APEC; the Organization for American States; UNCTAD; the World Bank; and the WTO. Additionally, the Advisory Committee received submissions discussing OECD programs; the OECD provides technical assistance through a collaborative effort staffed by enforcement officials from the United States and many of the other OECD jurisdictions just mentioned.

<sup>24</sup> From fiscal year 1990 through fiscal year 1998, the Antitrust Division provided technical assistance to over 30 competition offices and the Federal Trade Commission (FTC) engaged in technical assistance to 20 countries, primarily in Central and Eastern Europe, the New Independent States, Latin America and the Caribbean. See Annex 6-A hereto.

<sup>25</sup> Aside from funding DOJ and FTC technical assistance programs, USAID reports that it has provided funding for competition policy and related assistance to the U.S. Department of Commerce as well as to private institutional contractors, such as the Institutional Reform and the Informal Sector (IRIS) at the University of Maryland, the Harvard Institute for International Development (HIID), and the Carana Corporation, among others. Submission by Emmy B. Simmons, Deputy Assistant Administrator, Center for Economic Growth and Agricultural Development, U.S. Agency for International Development, in response to Advisory Committee Technical Assistance Outreach (Sept. 15, 1999).

<sup>26</sup> The 1989 Support for East European Democracy (SEED) Act., P.L. 101-179, Nov. 28, 1989. This act provides, among other things, for country-specific assistance to take place within the framework of common, region-wide strategic goals of economic restructuring, democratic transition, and social stability. Development of a market economy and a strong private sector are two of SEED's principle points of concentration.

<sup>27</sup> Most significant among these goals is the development of more predictable business law regimes, and hence a more favorable atmosphere for trade and investment within the Americas.



opportunity to share its perspectives and thus the legal environment in which U.S. exporters and business concerns operate.<sup>28</sup>

U.S. agencies do not appear to advocate the nation's consumer welfare model as forcefully as the EU has advocated its vision of competition policy. The EU often requires that countries with whom it enters into trade agreements also adopt its competition law as a model. Although the EU is contemplating significant reforms to its competition policy, in general its approach has tended to be more regulatory than the U.S. approach. Moreover, the EU approach is more commonly replicated around the world than is the U.S. approach. Not only is the EU a regional entity to which many new market economies are seeking membership, but certain substantive features of EU law may be seen as more congenial to transition nations.

U.S. antitrust authorities do not base their technical assistance efforts on advocacy of a U.S. model; a posture that this Advisory Committee views as fully appropriate. Countries will select those approaches most suitable to their development and policy needs.<sup>29</sup> The United States should thus use the opportunities afforded by its technical assistance programs not only to advance its perspective about sound competition policies but also to promote a more balanced understanding of the U.S. approach to competition.

In technical assistance activities organized by the OECD, U.S. antitrust authorities work together in case study seminars with competition authorities from other OECD countries. These seminars focus participants on practical enforcement issues, particularly on the correct application of competition principles in the analysis of cases and strategies for achieving effective results in enforcement actions. Some common enforcement issues addressed during these seminars include:

- The application of incorrect analysis in antitrust cases and investigations (such as, the lack of attention to important threshold issues like market definition and entry conditions and an inadequate understanding of the competitive effects of the conduct at issue);
- The establishment of merger notification regimes that are overly-inclusive resulting in the diversion of scarce resources to the review of large numbers of merger

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<sup>28</sup> See Submission by Donald I. Baker, Baker & Miller PLLC, in response to Advisory Committee Technical Assistance Outreach (Aug. 13, 1999), enclosing Donald I. Baker, Practical Risks and Opportunities for Countries Creating New Competition Laws and Enforcement Agencies, presented at The COMESA Conference on Competition Law and Policy, Sponsored by COMESA, UNCTAD, and the Zambian Competition Commission (June 3-4, 1999).

<sup>29</sup> For example, the Israel Antitrust Authority recently promulgating a Corporate Compliance Program, about which the General Director explained, "[t]he roots of our compliance methodology can be easily identified as American, Canadian and European. We did not reinvent the wheel, yet took much care and invested significant efforts to adapt foreign compliance programs to the circumstances and needs of our local economy." *Forward* by Dr. David Tadmor, General Director, Israel Antitrust Authority, THE CORPORATE COMPLIANCE PROJECT: HOW TO CREATE AND MAINTAIN AN EFFECTIVE COMPLIANCE PROGRAM RECOGNIZED BY THE ISRAEL ANTITRUST AUTHORITY at 1 (unofficial translation).

notifications;

- The application of incorrect standards to abuse of dominance or monopolization cases (for example, focusing on exploitative conduct such as monopolistic pricing or unjustified reduction of output as opposed to exclusionary conduct; and imposing unnecessarily rigorous standards of “fair play” on firms with market power); and
- The use of ineffective or unnecessarily regulatory remedies in cases where violations are found.<sup>30</sup>

The Advisory Committee believes that such seminars are useful in conveying best practices in antitrust analysis to nascent competition authorities. Moreover, the benefits of this type of work are not limited to the officials of these new enforcement regimes. The experience of having U.S. enforcement officials working side by side with officials from other OECD member jurisdictions helps to deepen mutual understanding, trust, and a sense of shared mission among developed country officials. In practical ways, the goals of soft harmonization and convergence are advanced through such activities.

New competition regimes face many daunting obstacles to their success. How is a new agency to recruit experienced personnel effectively? How can such an agency achieve a degree of political independence? How is it to develop the requisite analytical capabilities to identify, investigate, and analyze cases rigorously? Many jurisdictions lack a comprehensive legal framework or the procedural remedial tools needed for effective enforcement. In jurisdictions where enforcement is ultimately entrusted to the judiciary, judges are often untrained in competition policy. These are serious challenges for any jurisdiction and take many years of commitment and hard work to implement effectively.<sup>31</sup>

Support to new regimes should be included among U.S. funding priorities and the U.S. government should more vigorously pursue a variety of ways of offering such support. Distance learning seminars,<sup>32</sup> Internet discussion sites,<sup>33</sup> and development of a repository of resource

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<sup>30</sup> Submission by OECD, Competition Law and Policy Division, in response to Advisory Committee Technical Assistance Outreach (Aug. 5, 1999) at 5.

<sup>31</sup> *See, e.g.*, Submission by James C. Hamill, Executive Assistant to the Chairman, FTC, in response to Advisory Committee Technical Assistance Outreach (Sept. 2, 1999) at 4.

<sup>32</sup> This suggestion was made by Malcolm B. Coate, an economist with FTC. As background, he explains that numerous antitrust agencies maintain websites that disclose information on their focus and enforcement efforts, and that there are also antitrust discussion groups on the Internet, at least one of which resulted in the creation of a traditional journal dedicated to the discussion of competition policy: the *Journal of Latin American Competition Policy*, which is now merging with a related publication. He proposes that, “if necessary, the discussion site could be open to the public, but a quasi-private discussion site would probably be more helpful. Possibly two sites could be maintained initially, and thus competition between sites would identify the more popular approach.” Submission by Malcolm B. Coate, Bureau



information<sup>34</sup> are but a few examples of the ways to take advantage of new technology and reach interested governments and experts around the world. Additionally, there may be some value in deepening consultation and cooperation between those major jurisdictions that are providing such technical assistance (for example, between the United States and the EU) as well as further cooperation through existing programs organized by international organizations. In this regard, the OECD's program of technical assistance provides one particularly useful example. The OECD through its competition policy staff has developed ongoing relationships with competition officials in many transition and developing countries and is experienced in organizing and running effective competition seminars and events.<sup>35</sup> Further, cooperation and consultation with other international organizations such as the World Bank should also be developed still further. All the same, duplication of effort is not necessarily bad. In some circumstances the benefits to overlapping programming (or "multiplicity") override the drawbacks because the higher level of funded programming ultimately results in more comprehensive assistance.<sup>36</sup>

#### SUMMARY OF RECOMMENDATIONS

<b>Global Competition Initiative</b>
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1. The Advisory Committee recommends that the United States explore the scope for collaborations among interested governments and international organizations to create a *new* venue where government officials, as well as private firms, nongovernmental organizations (NGOs) and others can exchange ideas and work towards common solutions of competition law and policy problems. The Advisory Committee calls this the "Global Competition Initiative."

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of Economics, U.S. Federal Trade Commission, in response to Advisory Committee Technical Assistance Outreach, (July 29, 1999).

<sup>33</sup> See Submission by Ignacio de Leon, Superintendent, ProCompetencia, Venezuela, in response to Advisory Committee Technical Assistance Outreach (Aug. 9, 1999).

<sup>34</sup> See, e.g., Submission by Anna Fornalczyk, President, Competition Development Center (COMPER), Poland, in response to Advisory Committee Technical Assistance Outreach (Aug. 17, 1999) (recommending consideration be given to making materials developed for technical assistance programs more widely available and translated).

<sup>35</sup> Submission by the OECD Competition Law and Policy Division, in response to Advisory Committee Technical Assistance Outreach (Aug. 5, 1999).

<sup>36</sup> See, e.g., William E. Kovacic, *The Competition Policy Entrepreneur and Law Reform in Formerly Communist and Socialist Countries*, 11 AM. U. J. INT'L. L. & POL'Y. 437, 448-451 (describing benefits of multiplicity as increasing the total pool of resources available for new antimonopoly agencies and providing a budget for professional development of new agency staff, among other things. Costs may involve: single donors supporting duplicative projects; different donors rivaling to provide technical assistance to the same new agency; and expending resources to protect turf and aggrandize influence at the expense of focusing on development of sound antitrust policy).

2. A Global Competition Initiative should be inclusive and would foster dialogue directed toward greater convergence of competition law and analysis, common understandings, and common culture. Such a gathering also could serve as an information center, offer technical expertise to transition economies, and perhaps offer mediation and other dispute resolution capabilities. Areas for constructive dialogue might include further discussions among competition agencies to:
  - Multilateralize and deepen positive comity;
  - Agree upon the consensus disciplines identified in Chapter 2 regarding best practices for merger control laws and develop consensus principles akin to the recent OECD recommendation on hard-core cartels; consider and develop disciplines to define actions of governments; for example in areas with negative spillover potential such as export cartels, which require broader international cooperation and consultation;
  - Consider and review the scope of governmental exemptions and immunities that insulate markets from competition around the world (as discussed in Chapter 5);
  - Consider approaches to multinational merger control that aim to rationalize systems for antitrust merger notification and review (as discussed in Chapter 3);
  - Consider frontier subjects that are quintessentially global such as e-commerce, which will create new challenges for policymakers around the world;
  - Undertake collaborative analysis of issues such as global cartels (discussed in Chapter 4) and market blocking private and government restraints (discussed in Chapter 5); and
  - Possibly undertake some dispute mediation and even technical assistance services.
3. A Global Competition Initiative does not require a new international bureaucracy or substantial funding. The Group of Seven (G-7) nations summit is an attractive model, in that it demonstrates that countries can create mechanisms to exchange views and attempt to develop consensus on economic issues without an investment in a secretariat or permanent staff. This proposed initiative would benefit from support from international organizations such as the WTO, OECD, the World Bank and UNCTAD.

<b>International Mediation of Competition Disputes</b>
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1. The Advisory Committee recommends that the U.S. Government and other interested governments and international organizations consider developing a new mediation mechanism as well as some general principles that might govern how international disputes,



at least sovereign competition policy disputes, might be evaluated under such a mechanism. This mechanism could be developed under the auspices of the proposed Global Competition Initiative or elsewhere.

2. The members of the panel would be drawn from a roster of internationally respected antitrust and competition experts. An examination of a competition policy conflict by an expert panel will face many challenges. However, in some circumstances it could prove useful to clarify the competition policy characteristics of the problem at hand.

### **The Role of the Department of Justice in U.S. Foreign Economic Policy**

1. The Advisory Committee believes that the law enforcement dimensions of antitrust must remain outside of the deliberative interagency process. Some members are concerned that the participation of antitrust officials in senior interagency deliberations broader than antitrust enforcement runs the risk of politicizing antitrust decisionmaking; others are more of the view that it is important to have such participation in all domestic and foreign policy deliberations that implicate competition policy.
2. The Antitrust Division, working in close consultation with the Federal Trade Commission, should be the lead negotiator on any international discussions on competition policy, be they multilateral, bilateral, or regional. This approach has parallels in other international negotiations, such as those involving financial services and securities.

### **Expanding U.S. Technical Assistance in Competition Law and Policy**

1. The United States needs to devote more of its limited technical assistance budget to the development of competition policy structures abroad.
2. Support to transition and developing antitrust regimes should be included among U.S. funding priorities, and the U.S. government should more vigorously pursue a variety of ways of offering such support.
3. The United States should create and seek opportunities for deepening consultation and cooperation with other countries and organizations providing technical assistance including those major jurisdictions that are engaged in providing structured technical assistance, and multilateral organizations such as the World Bank, the International Monetary Fund, the OECD, and the WTO.

# *Annexes*

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## **ANNEX 1-A**

Separate Statement of  
Advisory Committee Member  
Eleanor M. Fox





**ANNEX 1-A**  
**SEPARATE STATEMENT OF ADVISORY COMMITTEE MEMBER**  
**ELEANOR M. FOX**

The challenge of globalization is an internationalist challenge. Markets are integrating far beyond national lines. Firms are larger than nations, and obviously more far flung. Across many fields of economic regulation, policymakers have been observing spillovers, crossovers, and synergies, and have proposed bridges, networks and links for the common good of the world community.<sup>1</sup> It is time for the internationalist insights to be applied to competition policy.<sup>2</sup>

The Advisory Committee's Report, in my view, contains many progressive proposals for coordinating antitrust law regimes in the new global economy. With a focus on U.S. law and tools, and U.S. opportunities for seeking cooperation of neighbors, it pushes from "below" to achieve more robust national antitrust enforcement. It suggests, more tentatively, global cooperation. I would go further than most of my fellow Advisory Committee members, looking from the "top down" in an attempt to understand what is feasible in facilitating markets and easing systems clashes; and I would use the view from the top to inform the solutions from the bottom.

Believing that nationalism and systems clash are not exceptional, that convergence of law will and should occur only to a point,<sup>3</sup> and that some global integrative or communal solutions are necessary, I embrace but go beyond the Advisory Committee recommendations.

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<sup>1</sup> See Sol Picciotto, *The Regulatory Criss-Cross: Interaction between Jurisdictions and The Construction of Global Regulatory Networks*, in INTERNATIONAL REGULATORY COMPETITION AND COORDINATION: PERSPECTIVES IN ECONOMIC REGULATION IN EUROPE AND THE UNITED STATES, (W. Bratton, ed., 1996); Anne-Marie Slaughter, *The Real New World Order*, 76 FOREIGN AFFAIRS 183 (1997); Anne-Marie Slaughter, *Governing the Global Economy through Government Networks*, in THE ROLE OF LAW IN INTERNATIONAL POLITICS (in publication); Joel Trachtman, *L'Etat, C'est Nous: Sovereignty, Economic Integration and Subsidiarity*, 33 HARVARD INT'L L. J. 459 (1992). See also THOMAS FRIEDMAN, THE LEXUS AND THE OLIVE TREE (1999).

<sup>2</sup> See, e.g., Ernst-Ulrich Petersmann, *Legal, Economic and Political Objectives of National and International Competition Policies: Constitutional Functions of WTO "Linking Principles" for Trade and Competition*, 34 N. ENG. L. REV. 145 (1999); Karel van Miert, *International Cooperation in the Field of Competition: A View From the EC*, in 1998 FORDHAM CORP. L. INST., Ch. 2 (B. Hawk ed. 1999); Mitsuo Matsushita, *Reflections on Competition Policy/Law in the Framework of the WTO*, in 1998 FORDHAM CORP. L. INST., Ch. 4 (B. Hawk ed. 1999); Report (1999) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council of the World Trade Organization, WT/WGTCP/3; Report (1998) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council of the World Trade Organization, WT/WGTCP/2.

<sup>3</sup> See AMERICAN BAR ASSOCIATION SECTIONS OF ANTITRUST LAW AND INTERNATIONAL LAW AND PRACTICE, REPORT CONCERNING INTERNATIONALIZATION OF COMPETITION LAW RULES: COORDINATION AND CONVERGENCE (January 2000).



*Overregulation:* Globalization has put pressure on our system in which the laws of numerous nations<sup>4</sup> apply to the same conduct or transaction. The pressure comes especially at the point at which competition law is regulatory rather than liberalizing; paradigmatically, premerger notification filing-and-waiting regimes. In this area, sound regulation requires coordination, and modes adopted by the European Union for its internal market are often instructive. I would go further than the Advisory Committee to propose an opportunity for mutual recognition of premerger notification filings when the market of a would-be regulating nation is subsumed by the broader global market.<sup>5</sup>

*Systems clashes:* We must find international solutions for systems clashes, probably with international dispute resolution. Actual cases provide helpful laboratories. Boeing's acquisition of McDonnell Douglas — which the U.S. cleared and the EU threatened to enjoin — is such a case. Both the United States and the EU assert the right to enjoin offshore mergers of firms that sell in their markets. Other jurisdictions are likely to follow suit. Therefore overlaps and clashes are more and more likely to occur.

There are various possible agreements that nations might consider that would keep an international merger on track as a competition case and prevent diversion into a trade war. The Advisory Committee has proposed several progressive measures, on the order of transparency.

I believe that we must move further, in view of the need for a world view and in view of the fact that conflicts will otherwise always be resolved in favor of the nation that imposes the most aggressive remedies. In the absence of international rules and dispute resolution, we may eventually find it necessary to give the nation at the center of gravity a trumping right to enjoin or allow the merger (while other interested nations might retain the right to implement more modest, tightly tailored relief). But if any nation is, legitimately, to wear the mantle of *parens patriae* for the world, it would be obliged to count all costs of the merger, even those outside of its borders, as if they fell within its borders.<sup>6</sup> Indeed, we may reach the point — not just in merger law — at which counting all costs is an important obligation of all competition authorities vetting international transactions.

If national authorities do not broaden their perspectives to count all costs of conduct or transactions by their firms, we will probably move to international antitrust sooner rather than later, for these problems are world problems.<sup>7</sup>

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<sup>4</sup> I use the word “nation” to include regional polities; thus, the European Union.

<sup>5</sup> See Advisory Committee Report, Chapter 3, fn. 24, sketching an opt-in clearing house system.

<sup>6</sup> See Advisory Committee Report, Chapter 2, fn. 72.

<sup>7</sup> One appropriate “higher” solution would provide for international dispute resolution. The panel would begin to resolve the dispute by choice of law based on center of gravity. Thus, in Boeing/McDonnell Douglas, the panel would apply the U.S. rule to the true market.

*Market access:* Globalization has spotlighted loopholes in the world trading system; notably, loopholes that shelter foreign market-blocking conduct. This is a world trade problem, and it can be nicely informed by sympathetic concepts drawn from competition law.<sup>8</sup>

The Advisory Committee Report sets forth the problems but stops short of a meaningful solution. One problem is, simply, that a nation can allow its market to be closed by private restraints without breaching its GATT/WTO obligations. A second problem is that government measures that set the stage for private closure may escape condemnation because, in the abstract, they appear harmless; or because they existed at the time lower trade barriers were negotiated; or because the measures are not antforeigner on their face.<sup>9</sup> Moreover, government restraints get vetted in the WTO; private restraints get peeled away for competition agency attention. The synergies are never observed. Serious restraints are quite unlikely to get caught.<sup>10</sup>

Clearly, this problem should be remedied, and, in my view, it should be remedied in the WTO in a manner consistent with the principles of the world trading system. One solution is: Nations could seek amendments to the GATT/WTO that 1) close the Fuji-Kodak loophole;<sup>11</sup> 2) put the burden on nations to assure that their markets are open (free from artificial private as well as public restraints), and 3) hold nations accountable for the totality of market-blocking restraints. An obvious way for nations to fulfill the obligation to prevent private access restraints is to maintain and enforce competition laws that prohibit unreasonable market blockage.<sup>12</sup>

The Advisory Committee worries about the weaknesses of the WTO, and it prefers unilateral solutions. I believe that solutions, to be legitimate, inclusive, and complete, must be multilateral, and that we must devote more energies to strengthening and constitutionalizing the WTO.<sup>13</sup>

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<sup>8</sup> See AMERICAN BAR ASSOCIATION SECTIONS OF ANTITRUST LAW AND INTERNATIONAL LAW AND PRACTICE, REPORT ON PRIVATE ANTICOMPETITIVE PRACTICES AS MARKET ACCESS BARRIERS (January 2000).

<sup>9</sup> Japan — Measures Affecting Consumer Photographic Film and Paper, Report of the WTO Panel (Fuji-Kodak), WT//DS44/R ¶ 2.2 (Mar. 31, 1998).

<sup>10</sup> See Patricia Isela Hansen, *Antitrust in the Global Market: Rethinking "Reasonable Expectations,"* 73 SO. CAL. L. REV. 1601 (1999).

<sup>11</sup> That is, states should be responsible for their serious governmental restraints even if the restraints existed at the time of tariff negotiations and even if they are not facially discriminatory.

<sup>12</sup> See Advisory Committee Report, Chapter 5, fn. 231.

<sup>13</sup> See Petersmann, *supra* note 2.





## **ANNEX 1-B**

Biography of Members

List of Meetings and Hearings Held  
by the Advisory Committee

Advisory Committee Hearings Programs





**ANNEX 1-B**  
**INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE**  
**BIOGRAPHY OF MEMBERS**

***Co-Chairs:***

James F. Rill: Senior Partner with Collier, Shannon, Rill & Scott, PLLC. He has been practicing exclusively antitrust, competition, and merger law for almost 40 years. From 1989 to 1992, Mr. Rill was the Assistant Attorney General, Antitrust Division, U.S. Department of Justice. As AAG, he was responsible for negotiating the 1991 U.S.-EU antitrust cooperation agreement. Mr. Rill is a former Chair of the American Bar Association's Section of Antitrust Law, and is current Vice-Chair of the International Business and Industry Advisory Committee to the OECD Competition Law and Policy Committee. He is author and contributor to numerous publications and serves on the editorial board of BNA *Antitrust and Trade Regulation*, *The Antitrust Bulletin*, and the *Antitrust Report*.

Paula Stern: President of The Stern Group, Inc., an economic and trade analysis firm providing advice on international competitiveness policy and regulatory matters. As Commissioner and Chairwoman of the U.S. International Trade Commission from 1978 to 1987, the Honorable Dr. Stern analyzed and voted on over 1,000 trade cases across a spectrum of industries and agriculture. Dr. Stern serves on many public policy councils, including the President's Advisory Committee for Trade Policy and Negotiations. She is an author and public speaker on trade and foreign policy, Congress-Executive relations, women's issues, and U.S. relations in the Middle East, Asia, Europe and Latin America.

***Executive Director:***

Merit E. Janow: Professor in the Practice of International Trade at Columbia University's School of International and Public Affairs (SIPA). She is also Director of the International Economic Policy program at SIPA and Co-Director of Columbia's APEC Study Center. From 1990-93, she served as Deputy Assistant U.S. Trade Representative for Japan and China. At USTR, she was involved in the negotiation of over a dozen trade agreements. Previously, she practiced corporate law with Skadden, Arps, Slate, Meagher & Flom in New York. She is fluent in Japanese and is the author of several books and numerous articles.

***Committee Members:***

Zoë Baird: President of The Markle Foundation. Formerly Senior Vice President and General Counsel at Aetna, Inc. Ms. Baird has worked for General Electric as Counselor and Staff Executive and was a partner in the law firm of O'Melveny & Myers. She is a member of the Council on Foreign Relations, the American Law Institute and the James A. Baker III Institute for Public Policy. Ms. Baird serves on the Board of the Brookings Institution and the President's Foreign Intelligence Advisory Board.

Thomas E. Donilon: Senior Vice President, General Counsel and Corporate Secretary, Fannie Mae. Formerly a partner with the firm of O'Melveny & Myers. From 1993 to 1997, Mr. Donilon served as Assistant Secretary of State for Public Affairs and as Chief of Staff to Secretary of State Warren Christopher, for which he received the State Department's highest award, the Secretary of State's Distinguished Service Award. Mr. Donilon is currently co-chair of the Council on Foreign Relations' Congress and United States Foreign Policy Program.

John T. Dunlop: Lamont University Professor, Emeritus at Harvard University. He is a past Chairman of the Department of Economics at Harvard, former Dean of the Faculty of Arts and Sciences, and was acting Director of the Business and Government Center at the School of Government. Secretary of Labor during the Ford Administration. Professor Dunlop is the author of numerous books on wages and industrial relations. He is a Life Member of the National Academy of Arbitrators.

Eleanor M. Fox: Walter J. Derenberg Professor of Trade Regulation at New York University School of Law. She was a partner and is counsel at Simpson Thacher & Bartlett. She has served as Commissioner on President Carter's National Commission for the Review of Antitrust Laws and Procedures, as Chair of the Antitrust Law Section of the New York State Bar Association, as Vice President of the Association of the Bar of the City of New York, and as Vice Chair of the ABA Antitrust Law Section.

Raymond V. Gilmartin: Chairman of the Board, President and Chief Executive Officer of Merck & Company, Inc. Mr. Gilmartin is former Director and Chairman of the Pharmaceutical Research and Manufacturers of America and Chairman of the Healthcare Leadership Council. He is also a Director of the College Fund/The United Negro College Fund and a member of the Business Roundtable, the Business Council, and the Council on Competitiveness.

Vernon E. Jordan, Jr.: Senior Managing Director, Lazard Frères & Co. LLC; Of Counsel, Akin, Gump, Strauss, Hauer & Feld. Mr. Jordan was President of the National Urban League, Executive Director of the United Negro College Fund, and Attorney-Consultant to the U.S. Office of Economic Opportunity. He also has served on the President's Advisory Committee to the Points of Light Initiative Foundation, the Secretary of State's Advisory Committee on South Africa, and the Advisory Council on Social Security. Mr. Jordan is a member of the American Law Institute, the National Bar Association and the Council on Foreign Relations.

Steven Rattner: Deputy Chairman of Lazard Frères & Co. LLC. Mr. Rattner founded Lazard's Communications Group. Before beginning his investment banking career in 1982 with Lehman Brothers Kuhn Loeb Incorporated, Mr. Rattner was employed by The New York Times as a correspondent in New York, Washington and London, specializing in economic and energy matters. Mr. Rattner is Chairman of the Educational Broadcasting Corporation, a Trustee of the Brookings Institution and a member of the Council on Foreign Relations. In 1994 Mr. Rattner was named a Global Leader for Tomorrow by the World Economic Forum.



Richard P. Simmons: Chairman of the Board of Allegheny Technologies Incorporated. In addition to his role as Chairman of Allegheny Technologies, he is a member of the Executive Committee of Allegheny Conference on Community Development. He is also a life member of the MIT Corporation and a director of PNC Bank Corporation. Mr. Simmons is a director and past Chairman of the United Way.

G. Richard Thoman: President and Chief Executive Officer of the Xerox Corporation. Prior to joining Xerox, Mr. Thoman was Senior Vice President and Chief Financial Officer of the IBM Corporation. He is a member of the Council on Foreign Relations, The Business Council, and The Business Roundtable. He is also a director of DaimlerChrysler, a trustee of the Museum of Modern Art, a board member of the Americas Society, an advisory board member of the Yale University School of Business and the Fletcher School of Law and Diplomacy.

David B. Yoffie: Max and Doris Starr Professor of International Business Administration, Harvard Business School. Chairman of the Competition and Strategy Department and Chairman of the Advanced Management Program, Professor Yoffie also ran the School's international executive program, Managing Global Opportunities, and directed Harvard's four year research project on international trade. He is a widely published author on international business, technology, and competitive strategy.

***Counsel:***

Cynthia R. Lewis: Before joining the Advisory Committee as counsel, Cynthia Lewis was an associate with the law firm Skadden, Arps, Slate, Meagher & Flom from 1993-1998. While at Skadden she practiced with the Antitrust and EC Law departments in New York and Brussels, Belgium where she analyzed mergers under U.S. and European competition laws. She also assessed antitrust filing requirements in the U.S., Europe and the rest of the world on behalf of clients engaged in multinational transactions. She graduated *magna cum laude* from Georgetown University Law Center in 1993.

Andrew J. Shapiro: Before joining the Advisory Committee as counsel, Andrew Shapiro was an associate with the Washington law firm of Covington & Burling from 1995-1998 practicing with the international, litigation, and antitrust practice groups. He graduated from Columbia University School of Law in 1994 as a Harlan Fiske Stone Scholar and received a Master's Degree in International Affairs from Columbia University's School of International and Public Affairs in 1995. He is a term member of the Council on Foreign Relations.

Stephanie G. Victor: Ms. Victor joined the Advisory Committee as counsel with a background in international litigation and interagency enforcement cooperation after spending several years with the U.S. Commodity Futures Trading Commission. Previously, she practiced antitrust and trade law as an associate with the Washington law firm of Ablondi, Foster, Sobin and Davidow. Ms. Victor is a 1990 graduate of the Georgetown University Law Center and earned her undergraduate degree from the University of Pennsylvania in 1985. She is fluent in French.



**LIST OF MEETINGS AND HEARINGS  
HELD BY THE ADVISORY COMMITTEE\***

DATE	TYPE	LOCATION
November 19, 1999	Committee Meeting	Carnegie Endowment for International Peace <i>Washington, D.C.</i>
July 14, 1999	Committee Meeting	Carnegie Endowment for International Peace <i>Washington, D.C.</i>
May 17, 1999	Hearings	American Geophysical Union <i>Washington, D.C.</i>
April 22, 1999	Hearings	Center for Strategic and International Studies <i>Washington, D.C.</i>
March 17, 1999	Committee Meeting	Carnegie Endowment for International Peace <i>Washington, D.C.</i>
December 16, 1998	Committee Meeting	Carnegie Endowment for International Peace <i>Washington, D.C.</i>
November 2-4, 1998	Hearings	American Geophysical Union <i>Washington, D.C.</i>
September 11, 1998	Committee Meeting	Carnegie Endowment for International Peace <i>Washington, D.C.</i>
February 26, 1998	Committee Meeting	The Carlton Hotel <i>Washington, D.C.</i>

\* The transcripts of Advisory Committee meetings and hearings are available at the Advisory Committee's website at <http://www.usdoj.gov/atr/icpac/icpac.htm>.





## ADVISORY COMMITTEE HEARINGS PROGRAMS

### NOVEMBER HEARINGS DAY 1 - NOVEMBER 2, 1998

#### DISCUSSION WITH FOREIGN COMPETITION OFFICIALS

*Welcoming Remarks by Co-Chairs James F. Rill and Paula Stern and  
Assistant Attorney General for Antitrust Joel I. Klein*

***Session One: Opening Remarks***

Australia	<b>Allan Fels</b> , Chairman, Australian Competition & Consumer Commission
Brazil	<b>Gesner José Oliveira Filho</b> , President, Conselho Administrativo de Defesa Econômica
Canada	<b>Konrad von Finckenstein</b> , Director of Investigation and Research, Competition Bureau
EU	<b>Karel Van Miert</b> , Competition Commissioner, European Commission
France	<b>Jérôme Gallot</b> , Director General, Direction Générale de la Concurrence, Consommation et Répression des Fraudes
France	<b>Frédéric Jenny</b> , Vice President, Conseil de la Concurrence
Germany	<b>Dieter Wolf</b> , President, Federal Cartel Office
Japan	<b>Shogo Itoda</b> , Commissioner, Japan Fair Trade Commission
Japan	<b>Takaaki Kojima</b> , Deputy Secretary General, Japan Fair Trade Commission
Mexico	<b>Fernando Sanchez Ugarte</b> , President, Federal Competition Commission
Spain	<b>Luis de Guindos Jurado</b> , Director General de Política Económica y Defensa de la Competencia
Venezuela	<b>Ignacio de Leon</b> , Superintendent, ProCompetencia

***Session Two: Panel Discussion on Current U.S. Bilateral Agreements***

<i>Panelists:</i>	Australia	<b>Allan Fels</b>
	Canada	<b>Konrad von Finckenstein</b>
	EU	<b>Karel Van Miert</b>
	Germany	<b>Dieter Wolf</b>

***Session Three: Roundtable Discussion among all Foreign Officials on Enforcement Cooperation, Multijurisdictional Mergers, and Trade and Competition Policy Interface***

## ADVISORY COMMITTEE HEARINGS PROGRAMS

### NOVEMBER HEARINGS DAY 2 - NOVEMBER 3, 1998

#### MULTIJURISDICTIONAL MERGER REVIEW ISSUES

*Welcoming Remarks by Co-Chairs James F. Rill and Paula Stern*

#### MERGERS AND ACQUISITIONS IN A GLOBAL ECONOMY

*Session One: Commercial and Economic Perspectives on the Current Merger Wave*

*Panelists:* **James A. Langenfeld**, Principal, Law and Economics Consulting Group  
**Ali E. Wambold**, Managing Director, Lazard, Frères & Co., LLC  
**Steven B. Wolitzer**, Managing Director, Lehman Brothers

#### SOURCES OF CONFLICT AND SOLUTIONS

*Session Two: Panel on Information Sharing and Procedural Harmonization*

*Panelists:* **Michael D. Blechman**, Kaye, Scholer, Fierman, Hays & Handler  
**Gabriel Castañeda Gallardo**, Castañeda y Asociados, Mexico  
**Calvin S. Goldman**, Davies, Ward & Beck, Canada  
**Barry E. Hawk**, Skadden, Arps, Slate, Meagher & Flom LLP  
**Masahiro Murakami**, Professor, Yokohama National University, Japan, and Visiting Scholar, Harvard Law School  
**Phillip A. Proger**, Jones, Day, Reavis & Pogue  
**Michael J. Reynolds**, Allen & Overy, Belgium  
**Spencer Weber Waller**, Associate Dean and Professor of Law, Brooklyn Law School

*Session Three: Panel on Conflicts and Remedies*

*Panelists:* **James R. Atwood**, Covington & Burling  
**Ilene Knable Gotts**, Wachtell, Lipton, Rosen & Katz  
**William J. Kolasky, Jr.**, Wilmer, Cutler & Pickering  
**J. William Rowley**, McMillan Binch, Canada  
**Clive Stanbrook**, Stanbrook & Hooper, Belgium



## ADVISORY COMMITTEE HEARINGS PROGRAMS

### NOVEMBER HEARINGS DAY 3 - NOVEMBER 4, 1998

#### ENFORCEMENT COOPERATION; TRADE AND COMPETITION POLICY INTERFACE

##### *Welcoming Remarks by Co-Chairs James F. Rill and Paula Stern*

#### ENFORCEMENT COOPERATION

##### *Session One: Panel on International Cartels in a Global Economy*

*Panelists:* **Donald C. Klawiter**, Morgan, Lewis & Bockius LLP  
**Mark Leddy**, Cleary, Gottlieb, Steen & Hamilton  
**James R. Loftis, III**, Collier, Shannon, Rill & Scott, PLLC  
**Mark C. Schechter**, Howrey & Simon  
**Valerie Y. Suslow**, Associate Professor, University of Michigan School of Business Administration  
**A. Paul Victor**, Weil, Gotshal & Manges LLP  
**Leonard Waverman**, Principal, Law and Economics Consulting Group;  
Visiting Professor, London Business School; Professor, University of Toronto

#### TRADE AND COMPETITION POLICY INTERFACE

##### *Session Two: Panel on International Antitrust Cooperation: Bilateral and Plurilateral Efforts (Part I)*

*Panelists:* **Richard O. Cunningham**, Steptoe & Johnson LLP  
**Anna Fornalczyk**, President, Competition Development Center, Poland  
**Ana Julia Jatar**, Senior Fellow, Inter-American Dialogue  
**Mitsuo Matsushita**, Professor, Seikei University, Japan  
**J. David Richardson**, Visiting Fellow, Institute for International Economics;  
Professor, Syracuse University  
**Diane P. Wood**, Circuit Judge, U.S. Court of Appeals for the Seventh Circuit

##### *Session Three: Panel on International Competition Policy, Multilateral Institutions, and Foreign Economic Policy*

*Panelists:* **Harvey M. Applebaum**, Covington & Burling  
**Donald I. Baker**, Baker & Miller PLLC  
**Thomas R. Howell**, Dewey Ballantine LLP  
**John H. Jackson**, University Professor, Georgetown University Law Center  
**William E. Kovacic**, Professor, George Mason University School of Law  
**Petros C. Mavroidis**, Professor, University de Neuchatel; Visiting Professor, Columbia Law School

## ADVISORY COMMITTEE HEARINGS PROGRAMS

### SPRING HEARINGS DAY 1 - APRIL 22, 1999

*Welcoming Remarks by Co-Chairs James F. Rill and Paula Stern and  
Assistant Attorney General for Antitrust Joel I. Klein*

***Session One: Presentations on Confidential Information Sharing***

*IBA Panel:* **A. Neil Campbell**, McMillan Binch

*ICC Panel:* **Klaus F. Becher**, Senior Counsel, DaimlerChrysler AG

*ABA Antitrust*

*Leadership Panel:* **Phillip A. Proger**, Jones, Day, Reavis & Pogue  
**Janet L. McDavid**, Hogan & Hartson LLP

***Session Two: Presentations by Representatives of Trade Associations***

*Panelists:* **American Forest & Paper Association** - **Maureen R. Smith**, Vice President,  
International  
**The Business Roundtable** - **Robert C. Weinbaum**, Assistant General Counsel,  
General Motors Corporation and **Thomas Leary**, Hogan & Hartson LLP  
**National Association of Manufacturers** - **Stephen Bolerjack**, Counsel, Antitrust  
and Trade Regulation, Ford Motor Company  
**U.S. Chamber of Commerce** - **William Blumenthal**, King & Spalding  
**U.S. Council for International Business** - **Thomas M.T. Niles**, President

***Session Three: Presentations on the Role of International Institutions in Competition Policy***

*Panelists:* **Joe Phillips**, Organization for Economic Cooperation and Development  
**Mark A.A. Warner**, Organization for Economic Cooperation and Development

***Session Four: Presentations by the International Antitrust Law Committee of the ABA Section of  
International Law and Practice***

*Panelists:* **Donald I. Baker**, Baker & Miller PLLC  
**Michael H. Byowitz**, Wachtell, Lipton, Rosen & Katz  
**Paul S. Crampton**, Davies, Ward & Beck  
**Daryl A. Libow**, Sullivan & Cromwell

## ADVISORY COMMITTEE HEARINGS PROGRAMS

### SPRING HEARINGS DAY 2 - MAY 17, 1999

*Welcoming Remarks by Co-Chairs James F. Rill and Paula Stern,  
Attorney General Janet Reno and Assistant Attorney General Joel I. Klein*

**Session One:**     ***Presentations by Members of the ABA Section of Antitrust Law ICPAC Task Force***

**Topics:**             ***Multijurisdictional Mergers and Joint Ventures and The Effectiveness of Private  
Litigation As An Enforcement Tool in International Antitrust Cases***

**Introduction:**     **Phillip A. Proger**, Jones, Day, Reavis & Pogue; Chair, ABA Section of  
Antitrust Law  
**Janet L. McDavid**, Hogan & Hartson LLP

**Panelists:**         **Harvey M. Applebaum**, Covington & Burling; Co-chair, ABA Section of Antitrust  
Law ICPAC Task Force  
**A. Paul Victor**, Weil, Gotshal & Manges LLP; Co-chair, ABA Section of Antitrust  
Law ICPAC Task Force  
**Margaret E. Guerin-Calvert**, Economists Incorporated  
**Joseph F. Winterscheid**, Jones, Day, Reavis & Pogue

**Session Two:**     ***Presentations by Economists***

**Panelists:**         **Simon J. Evenett**, The Brookings Institution; Department of Economics, Rutgers University  
**David J. Salant**, Law and Economics Consulting Group  
**Leonard Waverman**, Law and Economics Consulting Group  
**Andrew R. Wechsler**, Analytic Studies International, Inc.

**Session Three:**   ***Presentations from Representatives of U.S. Businesses***

**Panelists:**         **Eastman Kodak Company - Christopher A. Padilla**, Director, International Trade Relations  
**Guardian Industries Corp. - Stephen P. Farrar**, Director, International Business  
**United Parcel Service - Larry Stevenson**, Vice President, International Industrial  
Engineering; **Andrew R. Wechsler**, Director of International Economic  
Strategy and Analysis, Analytic Studies International, Inc.; and **Raymond Calamaro**,  
Hogan & Hartson LLP

**Session Four:**     ***Presentations on Institution Building and Competition Law Advocacy***

**Panelists:**         **Richard Gordon**, International Monetary Fund  
**R. Shyam Khemani**, The World Bank  
**Emmy Simmons**, U.S. Agency for International Development





## **ANNEX 1-C**

### **U.S. Experience With International Antitrust Enforcement Cooperation**





## **ANNEX 1-C**

### **U.S. EXPERIENCE WITH INTERNATIONAL ANTITRUST ENFORCEMENT COOPERATION**

U.S. antitrust authorities have worked for over two decades to build formal mechanisms for international cooperation, signing their first formal bilateral antitrust cooperation agreement in 1976. This Annex discusses U.S. experience with international enforcement cooperation, beginning with a discussion of some of the traditional impediments to U.S. efforts at enforcing antitrust laws in international matters. It continues with a discussion of international cooperation through bilateral arrangements and agreements under the International Antitrust Enforcement Assistance Act (IAEAA), and then turns briefly to discuss mutual legal assistance treaties in criminal matters (MLATs) as well legal instruments under which enforcement cooperation is available, and concludes with an overview of multilateral and regional cooperation arrangements in the field. Finally, this section concludes with an assessment of cooperation pursuant to bilateral agreements and other international arrangements.

#### **CHALLENGES TO ANTITRUST ENFORCEMENT IN TRANSNATIONAL MATTERS**

Enforcement of national laws in international matters is a process that can be both more complex and less predictable than domestic enforcement. Historically, concerns by nations over issues of sovereignty have led to some combination of legal, practical, and political impediments to such enforcement aims. Some nations introduced a variety of legal obstacles to stymie other nations in their efforts to prosecute international antitrust matters, and of course, affected parties often take their own evasive measures. The most common barriers to both U.S. antitrust authorities and private plaintiffs can impede efforts at accessing information and witnesses across borders.

##### **Sovereignty Concerns**

Sovereignty and consequent jurisdictional issues are among those that historically have elicited the most objections from other governments to U.S. antitrust enforcement efforts and, accordingly, led to the implementation of protective measures that bar efforts by U.S. litigants to obtain information for use in their domestic actions.

Extraterritorial antitrust enforcement by U.S. antitrust enforcers has involved investigations into anticompetitive conduct of non-U.S. firms and individuals in violation of U.S. antitrust laws. Such conduct has included instances in which non-U.S. firms and individuals acting outside the United States have caused harm to competition within the United States and, on occasion, to U.S. firms doing business abroad. When engaging in this extraterritorial enforcement, U.S. antitrust authorities need to overcome sovereignty concerns that arise when they seek to obtain information and testimony from non-U.S. citizens located overseas; successfully meet jurisdictional requirements, including establishing personal jurisdiction and subject matter jurisdiction; and render valid service of process. Moreover, the successful prosecution of U.S. antitrust law under these

circumstances requires U.S. antitrust authorities to overcome potential objections that extraterritorial enforcement violates principles of “traditional comity.”

The term comity refers to the general principle that a country should take other countries’ important interests into account in its law enforcement in return for their doing the same. Traditional comity has been defined as “the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws.”<sup>1</sup> The Advisory Committee, in its deliberations, has considered these different dimensions. The application of comity with respect to application of the antitrust laws to conduct outside the United States remains an unsettled area of law after the most recent Supreme Court ruling in the area, *Hartford Fire Insurance Co. v. California*,<sup>2</sup> and lower federal U.S. courts have recently come to different interpretations of the holdings in this case.

For much of the postwar period, extraterritorial application of U.S. antitrust laws had been a significant source of tension between the United States and its trading partners. In response to U.S. assertions of extraterritorial jurisdiction, some nations introduced laws that could impede U.S. investigatory efforts to compel production or gain access to information or witnesses located abroad. Today, while they are rarely exercised in contrast with even two decades ago, these statutes remain in effect. They encompass blocking statutes, to prevent the U.S. from collecting evidence and testimony on foreign soil, and clawback statutes, to authorize the filing of local suits to recover multiple damages already paid in connection with a foreign judgement. Other mechanisms traditionally employed by foreign governments to resist or object to U.S. assertions of jurisdiction over foreign defendants are used occasionally today. These have taken the form of official protests to legal actions in the United States, including diplomatic notes of protest<sup>3</sup> and the filing of amicus curiae briefs in connection with ongoing U.S. litigation;<sup>4</sup> reservations against providing investigative

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<sup>1</sup> *Hilton v. Guyot*, 159 U.S. 113, 164 (1895), Black’s Law Dictionary, 334 (6<sup>th</sup> ed. 1990).

<sup>2</sup> 509 U.S. 764, 113 S.Ct. 2891 (1993). For cases that have considered the application of international comity in antitrust cases since *Hartford Fire*, see, e.g., *United States v. Nippon Paper Industries Co., Ltd.* 109 F.3d 1 (1<sup>st</sup> Cir. 1997); *Metro Industries, Inc. v. Sammi Corporation*, 82 F.3d 839 (9<sup>th</sup> Cir. 1996). See also *Filetech S.A.R.L. v. France Telecom*, 978 F.Supp. 464 (S.D.N.Y. 1997), *rev’d on other grounds*, 157 F.3d 922 (2d. Cir. 1998). For a further discussion of the case law since *Hartford Fire*, see Spencer Weber Waller, *From the Ashes of Hartford Fire: The Unanswered Questions of Comity*, Paper delivered to the Twenty-Fifth Anniversary Conference on International Antitrust Law & Policy, Fordham Corporate Law Institute, Oct. 22-23, 1998.

<sup>3</sup> See, e.g., Note No. 187, of 5 August 1977, from the Government of the United Kingdom to the United States Government (Department of State) concerning the extraterritorial reach of the 1977 amendments to the Export Administration Act. Reprinted in Lowe, *EXTRATERRITORIAL JURISDICTION: AN ANNOTATED COLLECTION OF LEGAL MATERIALS* (Grotius Pub. Ltd., London 1983), 147-149.

<sup>4</sup> See, e.g., Brief of amicus curiae of the Government of Japan, *United States v. Nippon Paper Industries Co.*, No. 96-2001 (1<sup>st</sup> Cir., filed Nov. 18, 1996) in which the Government of Japan argued among other things that application of the Sherman Act to conduct by Japanese corporations occurring wholly within Japan is not valid under principles of international law and international comity, and that under well-established canons of construction, U.S. antitrust laws



or judicial assistance under bilateral or multilateral treaties; and unwillingness to recognize and enforce acts of U.S. courts or extradition requests upon conclusion of antitrust litigation. Blocking statutes, no matter how sporadically invoked, stand as reminders to the hostility that may confront efforts by a U.S. antitrust authority to exercise and to enforce its compulsory power in the affected jurisdiction. Other obstacles include limitations on recognition and enforcement of foreign court orders, particularly those for multiple damages.

## Evidence Gathering

One persistent impediment to U.S. evidence gathering efforts in international antitrust matters is the government's limited ability to exercise its compulsory powers in order to obtain information located abroad. As a result, in international matters the government is unable to engage in standard information gathering practices, for example, searching the premises of a firm under investigation and seizing documents in the process. Compounding this situation is the fact that because evidence is located outside U.S. borders, there is a heightened possibility that essential information may be destroyed before U.S. antitrust authorities may have a chance to access it. Indeed, U.S. antitrust officials often emphasize that they are hindered in their efforts to aggressively pursue antitrust law violators because key documents and witnesses located abroad are often out of the reach of U.S. antitrust authorities.<sup>5</sup>

## Substantive and Procedural Differences

Substantive and procedural differences between the U.S. and non-U.S. legal systems can also generate frictions between nations. For example, as mentioned above, the United States is constrained in its ability to compel production of information and access to non-U.S. witnesses located overseas.<sup>6</sup> There are also significant differences between the U.S. and non-U.S. legal systems in the investigative and discovery features of litigation. In civil matters, parties to litigation

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do not apply to conduct occurring wholly within another country. *See also, e.g.,* In re Uranium Antitrust Litigation, 473 F.Supp. 382 (N.D. Ill. 1979) (No. 76-C-3830), Brief of *Amicus Curiae* The Government of Australia, Brief of *Amicus Curiae* The Government of Canada, Brief of *Amicus Curiae* The Government of The United Kingdom.

<sup>5</sup> Joel I. Klein, Assistant Attorney General for Antitrust, U.S. Department of Justice, Prepared statement before the Subcommittee on Antitrust, Business Rights, and Competition, Committee on the Judiciary, United States Senate, (May 4, 1999) at 8; and (Oct. 2, 1998) at 5.

<sup>6</sup> In civil matters, where information-gathering occurs routinely in both the investigation and pre-trial phases, and the government is authorized to exercise its compulsory powers by issuing civil investigative demands (CIDs) to persons located abroad as well as domestically. CIDs are used during the pre-filing stage of civil matters, and can be served internationally pursuant to U.S. law. Section 3 of the Antitrust Civil Process Act, 15 U.S.C. §1312. In criminal matters, grand jury subpoenas, in contrast, may not be served outside the territories of the United States unless directed at U.S. citizens. Nonetheless, valid service is recognized under U.S. law when it is made on a person within the United States, even if it compels production of information located abroad, *e.g.,* service of a grand jury subpoena upon a U.S. subsidiary of a non-U.S. corporation for information in the possession of the foreign parent is recognized as a valid exercise of compulsory power.



in the United States have far broader powers to seek out information both prior to filing and during the pre-trial phase of an action than are available in most other jurisdictions. Such differences can exist even with other common-law jurisdictions, where the scope of party-driven discovery is narrower than in the United States.<sup>7</sup> And in civil law jurisdictions, for instance, the equivalent of a discovery process is carried out by an impartial fact-finder in the person of a magistrate or a judge rather than the parties, as part of his or her responsibility to rule on matters in dispute. As a pragmatic matter, these differences may well thwart or place limits on U.S.-style efforts to gather information for use in antitrust investigations or litigation.

In a word, such differences between systems exist and can be sources of tension and certainly complexity. Cooperation between enforcement agencies offers the possibility of overcoming some of these obstacles. The following discussion examines the U.S. experience with international cooperation in the field of competition policy. It reviews the history and content of existing bilateral agreements as well as several multilateral recommendations. It then considers the cooperation that has occurred pursuant to these arrangements.

## INTERNATIONAL COOPERATION THROUGH BILATERAL ARRANGEMENTS

The United States is currently a party to bilateral antitrust cooperation arrangements with seven jurisdictions, several important multilateral arrangements made under the auspices of the Organization for Economic Cooperation and Development (OECD), and the North American Free Trade Agreement (NAFTA). The United States is also an active participant in the deliberations of the Asia Pacific Economic Cooperation (APEC) forum. Chapter 5 shall consider more specifically the roles of the OECD and of the World Trade Organization, and their activities related to competition policy.

### The Bilateral Antitrust Accords

The earliest formal bilateral antitrust cooperation agreement was signed with the Federal Republic of Germany in 1976. Later agreements involved Australia (1982), Canada (1984, superseded by a new agreement in 1995), the European Commission (EC) (1991, supplemented by a new agreement in 1998). In addition, in 1999, new agreements were signed with three countries: Israel, Japan and Brazil.<sup>8</sup> Under U.S. law, all of these bilateral agreements are so-called Executive

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<sup>7</sup> This is illustrated in the context of the Hague Convention of the Taking of Evidence Abroad in Civil and Commercial Matters, 23 U.S.T. 2555; T.I.A.S. 7444, a multilateral treaty under which assistance can be obtained for the purpose of taking depositions and gathering pre-trial evidence in connection with civil and commercial matters. Most of the approximately 50 parties to the Convention have specified that they will not provide pre-trial discovery of documents; *see generally*, GARY B. BORN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* (3d ed. 1996) at 895-902.

<sup>8</sup> *See* Agreement Between the Government of the United States of America and the Government of the Federal Republic of Germany Relating to Mutual Cooperation Regarding Restrictive Business Practices, June 23, 1976, United States-Federal Republic of Germany, 27 U.S.T. 1956, T.I.A.S. No. 8291, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶13,501; Agreement Between the Government of the United States of America and the Government of Australia Relating to

Agreements. They are formal and binding international agreements, but they have not been ratified by the United States Senate as treaties and thus do not override any inconsistent provisions of U.S. law.

Each of these agreements reflects two themes: enforcement cooperation, on the one hand, and the avoidance or management of disputes, on the other. According to the U.S. Department of Justice, the extent to which one or the other of these themes has predominated in a particular agreement has depended on the specific bilateral concerns and history from which the agreement emerged.<sup>9</sup> In addition, the most recent bilateral agreement includes a third theme, that of technical cooperation.

For example, the *German* agreement is focused predominantly on law enforcement cooperation, reflecting the strong post-World War II German antitrust enforcement tradition. As the earliest of these agreements, it is the least detailed. By contrast, the 1982 Australian and 1984 Canadian agreements centered more on conflict avoidance, which point of emphasis grew out of differences between the U.S. and these other governments over the *Uranium* antitrust litigation of the late 1970s and early 1980s in U.S. courts. Similarly, in the early 1980s, the United States and Australia were in heated dispute over a U.S. antitrust investigation involving ocean shipping in the U.S. - Australia/New Zealand trade. In negotiating these agreements, typically the United States had been concerned about preserving its ability to apply its antitrust laws to harmful anticompetitive conduct affecting U.S. commerce. The foreign government concern had been typically over ensuring that when its interests were affected, it would have advance notice and an opportunity for consultation and, further, that its interest would be considered in any enforcement action the U.S. might then undertake. While this is no longer a central concern in the negotiation of bilateral agreements today, it does apply in particular to earlier agreements.

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Cooperation on Antitrust Matters, June 29, 1982, United States-Australia, T.I.A.S. No. 10365, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶13,502; Memorandum of Understanding Between the Government of the United States of America and the Government of Canada as to Notification, Consultation, and Cooperation with Respect to the Application of National Antitrust Laws, March 9, 1984, United States-Canada, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶13,503A; Agreement Between the Government of the United States of America and the Government of Canada Regarding the Application of their Competition and Deceptive Marketing Practices Laws, August 3, 1995, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶13,503; Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, September 23, 1991, 30 I.L.M. 1491 (Nov. 1991), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶13,504; and OJ L 95/45 (27 April 1995), corrected at OJ L 131/38 (15 June 1995); Agreement Between the Government of the United States of America and the Government of the State of Israel Regarding the Application of Their Competition Laws, March 15, 1999, 4 Trade Reg. Rep. ¶13,506; Agreement Between the Government of the United States of America and the Government of the Federative Republic of Brazil Regarding Cooperation Between Their Competition Authorities In the Enforcement of Their Competition Laws, October 26, 1999.

<sup>9</sup> See World Trade Organization, Communication from the United States, *Approaches to Promoting Cooperation and Communication among Members including in the Field of Technical Cooperation*, WT/WGTCP/W/116 (April 15, 1999).



Each of the bilateral agreements includes provisions for: acknowledgment of a mutual interest in cooperation; provisions for notification of specific antitrust enforcement activities that affect “important interests” of the other party and a commitment to give careful consideration to one another’s important interests during the course of undertaking enforcement activities; exchanges of information (other than that which is statutorily protected) through regular meetings between officials; and agreement that there may be situations in which authorities will make determinations about whether to take action or exercise forbearance by applying principles of traditional comity and positive comity provisions.<sup>10</sup>

One of the more significant recent developments contained in the modern bilateral antitrust cooperation agreements are the provisions regarding positive comity. The 1991 US-EC, the 1995 US-Canada, and the 1999 U.S.-Israel, U.S.-Japan, and U.S.-Brazil agreements include positive comity provisions. The principle of positive comity rests on the notion that each party agrees to give serious consideration to requests by the other party to take appropriate antitrust enforcement action against anticompetitive conduct within the requested party’s jurisdiction that adversely affects the requesting party’s important interests.<sup>11</sup> This differs from the notion of traditional comity, which refers to the general principle that one country should take another countries’ important interests into account in its own law enforcement in return for the first country doing the same. As with all other provisions of these agreements, such cooperation remains voluntary and discretionary.

The potential use of positive comity is an issue that this Advisory Committee has considered in some detail and in particular in the context of perceived harm to U.S. export commerce. It is not a new concept, but it is still in its early days of application. Indeed, only in 1998 did the U.S. conclude its first expanded positive comity agreement -- with the EC -- that clarifies the situations that would presumptively call for referrals and delineates the report-back and consultation mechanisms that would come into play once a referral has been made. As of this time, there has only been one case of a formal positive comity referral, which was initiated by United States and directed toward the EC, although there have been several reported instances of informal requests. Positive comity and its application are examined in detail in Chapter 5.

### *New Bilateral Antitrust Agreements*

Before discussing the cooperation that has been achieved under these agreements, it is important to recognize that antitrust cooperation agreements continue to expand in several ways. In 1999, U.S. antitrust authorities entered into four bilateral antitrust agreements, including the first-ever agreement under the IAEAA, described in further detail below. The IAEAA agreement was

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<sup>10</sup> These provisions are not included in first-generation agreements with Germany and Australia.

<sup>11</sup> For example, in the 1995 Antitrust Enforcement Guidelines for International Operations, it states that “in determining whether to assert jurisdiction to investigate or bring an action, or to seek particular remedies in a given case, each Agency takes into account whether significant interests of any foreign sovereign will be affected.” U.S. DEPARTMENT OF JUSTICE/FEDERAL TRADE COMMISSION, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS 20 (1995) *reprinted in* 4 TRADE REG. REP. (CCH) ¶13,107 (1995).



signed with Australia, while non-IAEAA bilateral antitrust cooperation arrangements were signed with Israel, Japan, and Brazil. Each marks a new development in the cooperation building efforts of U.S. antitrust authorities, as briefly assessed below.

The first *IAEAA Agreement* was signed between the United States and Australia on April 27, 1999.<sup>12</sup> From a U.S. perspective, it was feasible to enter into such an agreement with Australia because of two features of the Australian system. First, Australia has a strong regime of confidentiality laws that will protect nonpublic information obtained from U.S. companies. Second, it's laws authorize entry into agreements under which such information may be exchanged in antitrust matters.

The three other bilateral agreements signed in 1999 are modeled on the earlier agreements signed with Canada (1995) and the EU (1991). Key features in each include notification of enforcement activities, enforcement cooperation and coordination, positive comity, conflict avoidance, consultations, and exchange of antitrust-related information. Like other bilateral agreements, these neither alter any existing laws nor provide for the exchange of confidential information. Each agreement does have distinct features, as well. The *U.S.-Israel Antitrust Agreement* (signed March 15, 1999) is the first bilateral agreement between the United States and a young antitrust regime. The *U.S.-Japan Antitrust Agreement* (signed October 7, 1999) marks an important development in relations between U.S. and Japanese antitrust enforcement authorities, partly because of the long history of trade and economic tension between the United States and Japan.<sup>13</sup> Finally, the *U.S.-Brazil Antitrust Agreement* (signed October 26, 1999) is the first to include provisions for technical cooperation. It is also the second agreement, after Israel, with a relatively young antitrust authority and the first with a developing economy.

### **Agreements Under the International Antitrust Enforcement Assistance Act (IAEAA)**

To address statutory limitations on the ability of U.S. antitrust authorities' to request assistance in obtaining access to and otherwise exchanging confidential information among other things, in 1994, Congress passed the International Antitrust Enforcement Assistance Act (IAEAA).<sup>14</sup> Specifically, the IAEAA provides that during the course of civil or criminal investigations U.S. antitrust enforcers can exchange confidential information, subject to certain conditions, as described below. In a concession to concerns about protections for business confidential and privileged information raised by business and legal groups during hearings on the IAEAA, the law specifies that

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<sup>12</sup> The finalization process commenced with publication of the agreement in April 1997 the Federal Register for notice and comment, pursuant to the IAEAA's dictates, and subsequent consideration by the Australian Parliament.

<sup>13</sup> Chapter 3 of this Report reviews that record, in particular those disputes where a feature of the U.S. complaint has centered on the perceived existence of anticompetitive or exclusionary business practices occurring in the Japanese market that inhibit access for U.S. firms.

<sup>14</sup> Pub. L. No. 103-438, 108 Stat. 4597, 15 U.S.C. §§ 6200-6212.

its provisions for sharing information do not apply to confidential information obtained in a Hart-Scott-Rodino premerger notification process.<sup>15</sup>

A precondition to entering into an agreement under the IAEAA is that the potential partner antitrust authority be empowered to provide *reciprocal assistance* to U.S. antitrust authorities in response to a similarly qualified request. This extends to information already in the authorities' possession as well as to information that one authority requests assistance in obtaining from another jurisdiction. Such information may be obtained through the use of either voluntary or compulsory means. Importantly, assistance under an IAEAA agreement may be provided whether or not the conduct underlying a request would constitute a violation of the antitrust laws of the requested party.

The Act requires that countries provide protection of confidential and privileged information under their own laws commensurate with that under U.S. law. Further, nothing in any IAEAA agreement will compel any person to provide antitrust evidence in violation of any legally applicable right or privilege.

Specific limitations exist on the use that may be made of evidence obtained pursuant to a request under an IAEAA agreement, requiring it be used or disclosed only for the purpose and investigation for which it was requested with two exceptions: if the information is "essential to a significant law enforcement objective" and if the authority providing the information consents; or if the information has been made public through a use -- such as an enforcement proceeding -- consistent with that for which it was requested under the IAEAA agreement. These provisions are similar, in an antitrust-specific environment, to the type of assistance that is available to U.S. government agencies in criminal matters (under MLATs, discussed below) as well as civil matters.<sup>16</sup>

In addition, the IAEAA is constructed around a framework of safeguards for confidential and privileged materials, as described below in Box 1-C-1. Some of the more significant IAEAA provisions on confidentiality are summarized in a chart on the following page. The IAEAA is premised on the notion that any partner to an IAEAA agreement be authorized to provide assistance upon a request from the U.S. antitrust authorities and to maintain safeguards in effect to protect confidential and privileged information. At the same time, the IAEAA enables U.S. antitrust authorities to provide enforcement assistance to foreign antitrust enforcement authorities under certain circumstances.<sup>17</sup> The circumstances are no less rigorous than under existing U.S. law,

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<sup>15</sup> Section 5(1) of the IAEAA, 15 U.S.C. §§ 6204(1).

<sup>16</sup> In civil and administrative matters, several federal agencies may request and receive the type of assistance listed above. Indeed, language in the IAEAA was modeled on that contained in statutory provisions of the U.S. Securities and Exchange Commission, which form the statutory basis for the numerous SEC enforcement cooperation agreements with securities authorities around the world.

<sup>17</sup> The IAEAA was patterned on legal authority conveyed to the U.S. Securities and Exchange Commission through which they have entered into an extensive network of information sharing and cooperation agreements, and adapted to take into consideration certain antitrust-specific concerns. See Testimony of Michael D. Mann, Director, Office of

including pursuant to requests that might be received in connection with criminal antitrust investigations from MLAT partners.

### **Mutual Legal Assistance Treaties for Use in Criminal Matters: Other Legal Instruments Under Which Enforcement Cooperation is Available**

IAEAA's are one among several legal instruments available to facilitate cooperation and exchange of confidential matters. In criminal antitrust matters, U.S. antitrust authorities also may make use of non antitrust-specific U.S. channels for enforcement cooperation through the network of bilateral mutual legal assistance treaties in criminal matters (MLATs)<sup>18</sup> that the United States has ratified since the mid-1970s. In contrast to the antitrust-specific cooperation agreements, the parties to these MLATs obligate themselves to assist one another in a variety of criminal matters -- in many instances, although not always, including antitrust crimes such as price-fixing -- by obtaining evidence located in one country for the benefit of the other country's law enforcement investigation. The Antitrust Division reports positive experiences using MLATs, although in most instances details of its experiences are not public. Standards for furnishing information pursuant to an MLAT request require a showing of particularized need and involve a case-by-case determination of whether to grant assistance in full or part. Use and disclosure of such information is strictly limited to the specific enforcement matter for which information is requested. All materials not passed into control of a presiding court in the prosecution must be returned at the conclusion of the matter.

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International Affairs, U.S. Securities and Exchange Commission, before the Subcommittee on Antitrust, Business Rights and Competition, Committee on the Judiciary, United States Senate (August 4, 1994).

<sup>18</sup> The United States has also entered into 30 MLATs and has signed at least 21 others that are awaiting ratification by the U.S. Senate or equivalent approval from the relevant foreign legislature before entering into force. Antitrust violations are criminal in a number of the countries with which the United States has MLATs and several of the jurisdictions with which signed agreements are awaiting ratification. Other countries have their own MLAT networks.



**Box 1-C-1:**

**Safeguards in IAEAA Agreements  
for Confidential and Privileged Information**

- U.S. assistance, in full or part, is conditioned upon approval on a case-specific basis by the U.S. Attorney General or the U.S. Federal Trade Commission, requiring a determination that the requesting authority: (i) will satisfy the assurances, terms and conditions described in the IAEAA concerning use, disclosure, or permitting the use or disclosure of evidence received pursuant to the request, (ii) will make available reciprocal assistance; (iii) is capable of complying with the confidentiality requirements applicable under the relevant IAEAA agreement and will do so; and (iv) a determination that granting the request is consistent with the public interest of the United States, taking into consideration the context of the requested assistance. (Sections 3, 8(a))
- All legally applicable rights or privileges are protected for persons compelled to produce materials, testimony or statements in connection with an investigation initiated in response to a request under an IAEAA agreement, including protections for confidential and business sensitive information in the possession of the U.S. antitrust authorities and reciprocal rights in effect in foreign antitrust authority's jurisdiction. (Sections 3(d), 4(c))
- U.S. antitrust authorities are prohibited from disclosing any antitrust evidence received under an IAEAA agreement that would violate such agreement, *except* that no IAEAA agreement may prevent the disclosure of such evidence to a defendant in an action or proceeding brought by either U.S. antitrust authority for a violation of any of the Federal laws if such disclosure would otherwise be required by Federal law. (Section 8(b))

IAEAA Agreements must contain: “an assurance that the foreign antitrust authority is subject to laws and procedures that are adequate to maintain securely the confidentiality of antitrust evidence that may be received under section 2, 3, or 4 and *will give protection to antitrust evidence received under such section that is not less than the protection provided under the laws of the United States to such antitrust evidence*”; citations and descriptions (including enforcement mechanisms and penalties) of the applicable confidentiality laws in each jurisdiction; “terms and conditions that specifically require using, disclosing, or permitting the use or disclosure of, antitrust evidence received under such agreement or such memorandum only— (i) for the purpose of administering or enforcing the foreign antitrust laws involved, or (ii) with respect to a specified disclosure or use requested by a foreign antitrust authority and essential to a significant law enforcement objective, in accordance with the prior written consent that the Attorney General or the Commission, as the case may be, gives after— [making various additional determinations];” the return of the evidence at the conclusion of an investigation; and automatic notification and termination provisions if confidentiality violations occur. (Section 12) (Emphasis added).

## Regional Cooperation Arrangements

In the past few decades, regional organizations have become actively engaged on issues of competition law and policy. The growth in interest has as its corollary, growth in the role that antitrust laws are playing in jurisdictions who are members of these organizations. Competition policy matters are also embodied in at least an elementary manner in multilateral agreements, such as the North American Free Trade Agreement (NAFTA), and they are the subject of discussion and deliberation in a variety of other fora.

### *Asia-Pacific Economic Cooperation*

The United States has been a key participant in the Asia-Pacific Economic Cooperation (APEC) forum since its inception in 1993. APEC is a deliberative forum which has as its goals the advancement of economic cooperation and trade and investment liberalization and facilitation. With the exception of certain mutual recognition agreements that have been developed under the aegis of APEC, it has not served as a forum for the development of binding agreements. Competition policy is a substantive area of interest in APEC. Work in this area has been undertaken in a series of annual workshops on competition policy and deregulation issues held under the aegis of the Committee on Trade and Investment. At their meeting in September 1999, APEC Leaders endorsed a set of non-binding principles developed by this workshop that are intended to act as “benchmarks” for member economies in their efforts to achieve dynamic competitive markets as well as in their efforts at regulatory reform.<sup>19</sup>

### *North American Free Trade Agreement*

There is some rudimentary coverage of competition policy matters under the North American Free Trade Agreement (NAFTA). Specifically, NAFTA’s Chapter 15 contains four substantive articles: Article 1501 requires each party to “adopt or maintain measures to proscribe anti-competitive business conduct and take appropriate action with respect thereto” and requires the parties to cooperate on “issues of competition law enforcement policy, including mutual legal assistance, notification, consultation and exchange of information relating to the enforcement of competition laws in the free trade area.” The provision specifically excludes dispute settlement for any matter arising under the article. Article 1502 sets forth rules regarding official monopolies including requirements of transparency and nondiscriminatory treatment to the investors, goods or service providers of another party. Similarly, Article 1503 sets forth rules concerning state enterprises that requires parties to ensure that state enterprises do not act inconsistently with other provisions of the agreement and that they act in a nondiscriminatory fashion toward other parties. Article 1504 established a Working Group on Trade and Competition to make recommendations on further work as appropriate within five years of entry into force of the Agreement. While recommendations were due in late 1998, no recommendations have been released as of this writing.

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<sup>19</sup> “APEC Principles to Enhance Competition and Regulatory Reform: Open and Competitive Markets are the Key Drivers of Economic Efficiency and Consumer Welfare” (1999).



Article 15 of NAFTA does not attempt to harmonize procedural rules nor to articulate general standards. In 1994, the American Bar Association proposed eight framework principles for developing the competition principles of NAFTA and, in an extensive report, a task force of the ABA Antitrust Section provided an elaboration of how those principles might be put into practice.<sup>20</sup> The NAFTA 1504 Working Group, however, apparently did not choose to use the regional agreement to deepen competition policy across borders.

### **Assessment of Cooperation Pursuant to Bilateral Agreements and Other International Arrangements**

It appears that cooperation is now occurring on specific enforcement matters and across the spectrum of civil and criminal cases. Multijurisdictional mergers are one area where this now occurs regularly. This is examined in considerable detail in Chapter 2 herein. There have also been several civil nonmerger cases that illustrate a new degree of cooperation between U.S. and foreign authorities. For example, in 1994, the Department of Justice and the European Commission's European Competition Directorate (DG-COMP, formerly known as DG-IV) conducted parallel investigations of anticompetitive practices by *Microsoft* that resulted in a single, jointly negotiated and coordinated remedy, implemented by a virtually identical court decree in the U.S. and an undertaking in Europe. According to the U.S. Department of Justice, this degree of cooperation was possible because Microsoft agreed to waive confidentiality restrictions on information it had provided to the investigating authorities, and the staffs on both sides of the Atlantic consequently were able to coordinate their investigations to a degree that could not have been achieved otherwise.<sup>21</sup>

A case that is often referred to as an informal positive comity referral occurred in 1996, where the Department of Justice conducted an investigation of *AC Nielsen* to determine whether Nielsen offered customers more favorable terms in countries where Nielsen had market power if those customers also used Nielsen in countries where it faced significant competition. The European Commission also investigated the case, since most of the conduct occurred in Europe and had a direct impact on consumers there. There was close contact between the staffs of both agencies, indeed the agencies ultimately publicly lauded the level of cooperation they achieved: not only as an example of conditional deference of jurisdiction to the party most closely connected to the conduct, but also for their high level of cooperation, which was enhanced because they were able to exchange confidential information pursuant to a waiver. In this instance, the U.S. Department of Justice closed its investigation when it became clear that it made sense to have DG-COMP take the

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<sup>20</sup> ABA SECTION OF ANTITRUST LAW, *THE COMPETITION DIMENSION OF NAFTA* (1994).

<sup>21</sup> See World Trade Organization, Communication from the United States, *Approaches to Promoting Cooperation and Communication among Members including in the Field of Technical Cooperation*, WT/WGTCP/W/116 (April 15, 1999).



lead. There have been other such cases that are matters of public record.<sup>22</sup> And, in April 1997, DOJ announced its first positive comity request to the EC under the 1991 agreement. That case is discussed in greater detail in Chapter 5.

It is too early to gauge cooperation under the IAEAA agreements between the United States and Australia. The U.S.-Australian agreement provides a vehicle for the signatory authorities to request broad assistance in criminal and civil nonmerger antitrust matters, including exercises of compulsory power to obtain testimony and documentary information. Notably, though, because the universe of nonmerger cases involving U.S. and Australian interests is relatively small, this agreements is unlikely to impact the enforcement landscape significantly.

Over the past decade, U.S. antitrust authorities have benefited from enforcement assistance in several criminal cartel matters. The Antitrust Division describes using MLATs -- most notably the one with Canada<sup>23</sup> -- to obtain foreign-located documents and witness testimony in connection with several different U.S. investigations into international cartels. It also reports receiving assistance in some matters through informal mechanisms. These experiences are discussed in Chapter 4.

It also appears that competition officials in a number of countries are interested in expanding the number of such bilateral agreements to which they are a party and deepening the range of areas of coverage, at least with the United States. At ICPAC hearings for example, Canadian, EC and other officials indicated their interest in exploring possibilities for MLATs or IAEAA arrangement or other bilateral arrangements.<sup>24</sup>

In sum, bilateral antitrust cooperation agreements appear to be an important instrument for fostering cooperation between U.S. and foreign competition authorities. In some instances this is resulting in cooperation on specific enforcement matters, while more generally these instruments are being used to deepen contacts and communications, which over time appear to be useful and necessary building blocks to still greater cooperation. Nevertheless, in many respects, at present the bilateral agreements still remain limited instruments. Because they do not alter existing law or otherwise expand the powers of antitrust authorities, they do not expand possibilities for the sharing

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<sup>22</sup> For example, the FTC closed an investigation in 1997 in view of an enforcement action by the Italian Competition Authority. This was a case involving a production quota maintained by *Parma ham producers* seen as adversely affected consumers both in Italy and in export markets, including the United States. The FTC decided to stay its hand once it became apparent that the Italian investigation was underway and the remedy likely to address FTC concerns.

<sup>23</sup> The U.S.-Canada MLAT entered into force in 1990.

<sup>24</sup> Some jurisdictions other than the United States have their own active bilateral cooperation agenda. The EU is the most dramatic example. The European Commission entered into bilateral cooperation agreements with the United States and Canada (June 1999). Additionally, Australia has been active, signing agreements with the United States and providing for competition law cooperation in its 1994 agreement with New Zealand and in a bilateral competition assistance agreement with Taiwan (1996). New Zealand has also entered into a bilateral Antitrust cooperation agreement with Taiwan (1997).

of confidential or privileged information without the provider's consent, including statutorily protected information, commercially sensitive or privileged information, or nonpublic investigatory information. They may not provide a mechanism for resolving disputes that continue after the end of consultations. Further, the agreements do not implicate substantive law nor seek to reach any formal procedural harmonization between the signatory jurisdictions.<sup>25</sup>

The specific contribution of bilateral instruments will hinge on the particular characteristics of the jurisdictions that are entering into them. Bilateral cooperation arrangements are likely to offer the United States meaningful assistance on a matter of enforcement priority for the U.S. In other instances, bilateral cooperation arrangements may provide an opportunity for the United States to encourage the development of new competition agencies.

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<sup>25</sup> See generally A. Douglas Melamed, Principal Deputy Assistant Attorney General for Antitrust, U.S. Department of Justice, *An Important First Step: A U.S./Japan Bilateral Antitrust Cooperation Agreement*, Address before the Japan Fair Trade Institute (November 12, 1998) at 6-10.

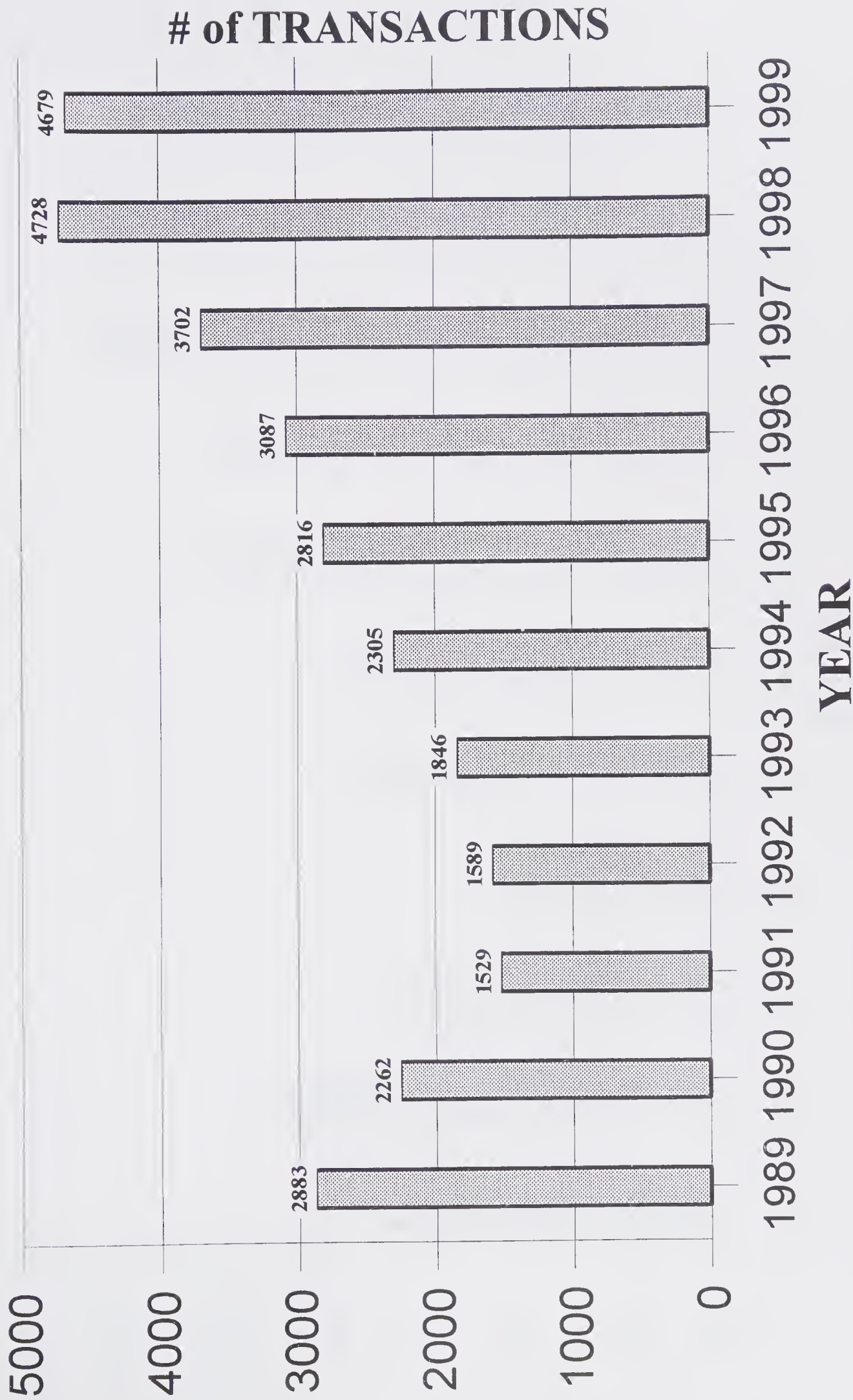
## **ANNEX 2-A**

### **HSR Filing and Enforcement Statistics**





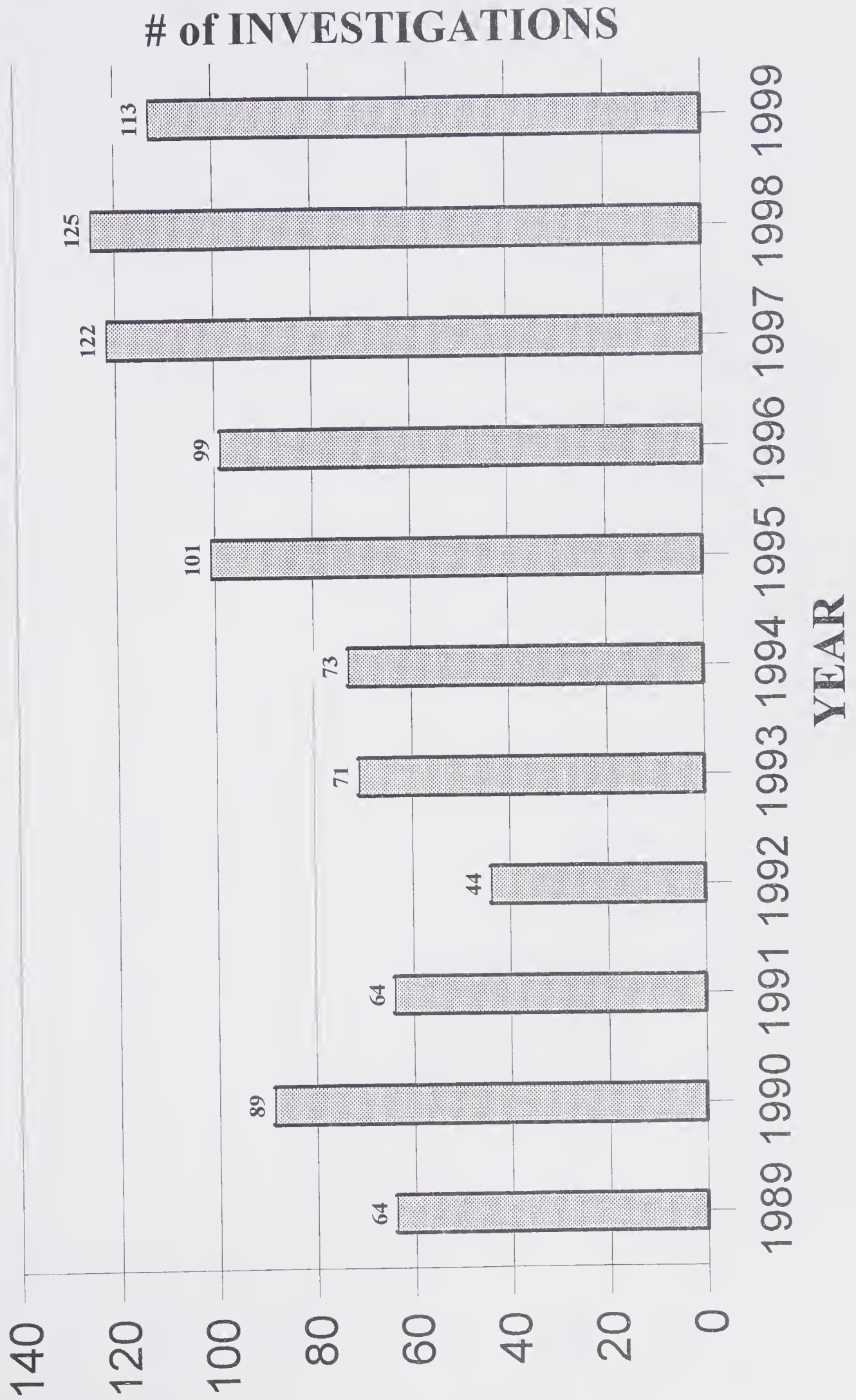
# HSR TRANSACTIONS





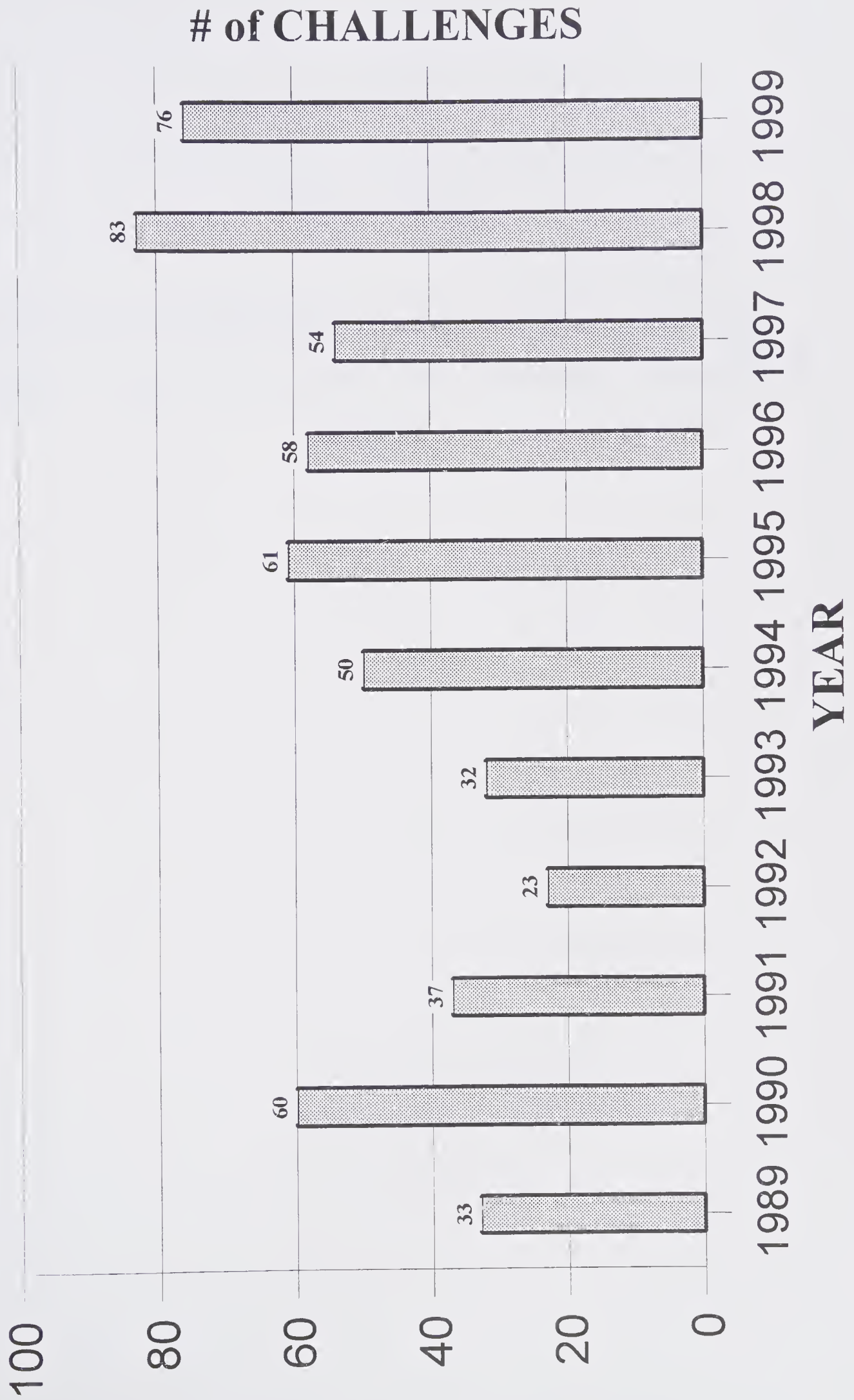


## SECOND REQUEST INVESTIGATIONS





# MERGER CHALLENGES







## **ANNEX 2-B**

Transactions Reported Under HSR Involving a  
Foreign Acquiring Person or a Foreign Acquired  
Entity





ANNEX 2-B

1999 Transactions Reported Under HSR Involving a Foreign Acquiring Person or Foreign Acquired Entity									
Transaction Range (\$Millions)	HSR Transactions Number	Clearance Granted		Second Request Investigations		Enforcement Actions			
		FTC	DOJ	FTC	DOJ	FTC	DOJ		
Less than 15	30	1	2	0	0	0	0		0
15 up to 25	140	6	4	1	1	1	1		1
25 up to 50	175	12	9	1	0	0	1		1
50 up to 100	138	10	12	2	4	1	0		0
100 up to 150	80	8	4	0	0	0	0		0
150 up to 200	46	4	4	1	2	0	0		0
200 up to 300	49	3	0	1	0	1	0		0
300 up to 500	43	3	1	0	0	0	0		0
500 up to 1000	48	7	5	0	2	0	0		0
1000 and up	100	10	6	2	4	0	0		0
<b>ALL TRANSACTIONS</b>	<b>849</b>	<b>64</b>	<b>47</b>	<b>8</b>	<b>13</b>	<b>3</b>	<b>2</b>		<b>2</b>



**1998 Transactions Reported Under HSR Involving a Foreign Acquiring Person or a Foreign Acquired Entity**

Transaction Range (\$Millions)	HSR Transactions Number	Clearance Granted		Second Request Investigations		Enforcement Actions	
		FTC	DOJ	FTC	DOJ	FTC	DOJ
Less than 15	29	-	1	-	1	-	-
15 up to 25	167	12	7	-	1	-	-
25 up to 50	148	16	7	1	2	-	-
50 up to 100	111	9	3	3	2	3	-
100 up to 150	51	1	3	1	1	1	-
150 up to 200	33	3	1	-	-	-	-
200 up to 300	42	3	2	-	1	-	1
300 up to 500	53	8	5	-	3	-	-
500 up to 1000	39	4	2	1	-	1	-
1000 and up	63	13	8	3	5	2	1
<i>ALL TRANSACTIONS</i>	736	69	39	9	16	7	2





**1997 Transactions Reported Under HSR Involving a Foreign Acquiring Person or a Foreign Acquired Entity**

Transaction Range (\$Millions)	HSR Transactions Number	Clearance Granted		Second Request Investigations		Enforcement Actions	
		FTC	DOJ	FTC	DOJ	FTC	DOJ
Less than 15	20	-	-	-	-	-	-
15 up to 25	61	6	4	1	-	-	-
25 up to 50	99	7	7	1	1	-	-
50 up to 100	83	8	7	1	3	-	-
100 up to 150	44	8	5	-	1	-	-
150 up to 200	22	2	1	1	1	1	-
200 up to 300	36	4	4	-	2	-	1
300 up to 500	34	10	3	4	2	2	-
500 up to 1000	31	6	2	1	1	-	-
1000 and up	39	6	3	4	1	4	1
<b>ALL TRANSACTIONS</b>	<b>469</b>	<b>57</b>	<b>36</b>	<b>13</b>	<b>12</b>	<b>7</b>	<b>2</b>





**1996 Transactions Reported Under HSR Involving a Foreign Acquiring Person or a Foreign Acquired Entity**

Transaction Range (\$Millions)	HSR Transactions Number	Clearance Granted		Second Request Investigations		Enforcement Actions	
		FTC	DOJ	FTC	DOJ	FTC	DOJ
Less than 15	41	1	4	1	2	1	-
15 up to 25	126	12	7	-	2	-	-
25 up to 50	177	19	9	3	1	3	-
50 up to 100	87	10	5	1	1	1	-
100 up to 150	40	3	6	-	2	-	1
150 up to 200	24	2	6	-	1	-	1
200 up to 300	41	1	1	-	1	-	1
300 up to 500	23	5	5	2	2	2	-
500 up to 1000	22	4	3	-	1	-	-
1000 and up	43	11	5	3	1	3	1
<i>ALL TRANSACTIONS</i>	624	68	51	10	14	10	4



## **ANNEX 2-C**

### **Worldwide Antitrust Merger Notification Systems**





## **ANNEX 2-C**

### **Worldwide Antitrust Merger Notification Systems**





## ANNEX 2-C

### WORLDWIDE ANTITRUST MERGER NOTIFICATION SYSTEMS<sup>1</sup>

MANDATORY PRECLOSING NOTIFICATION SYSTEM		MANDATORY POSTCLOSING NOTIFICATION SYSTEM	VOLUNTARY NOTIFICATION SYSTEM
Albania	Latvia	Argentina	Australia
Argentina	Lithuania	Denmark	Chile
Austria	Macedonia	Greece	Ivory Coast
Azerbaijan	Mexico	Indonesia (as of March 2000)	France
Belarus	Moldova	Japan	New Zealand
Belgium	Netherlands	Macedonia	Norway
Brazil	Poland	Russia	Panama
Bulgaria	Portugal	South Africa	United Kingdom
Canada	Romania	South Korea	Venezuela
Colombia	Russia	Spain	
Croatia	Slovak Republic	Tunisia	
Cyprus	Slovenia		
Czech Republic	South Africa		
EC	South Korea		
Estonia	Sweden		
Finland	Switzerland		
Germany	Taiwan		
Greece	Thailand		
Hungary	Tunisia		
Ireland	Turkey		
Israel	Ukraine		
Italy	USA		
Japan	Uzbekistan		
Kazakhstan	Yugoslavia		
Kenya			

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<sup>1</sup> The information contained on this list is based on best available information; to determine whether a country has a merger control law with a notification obligation, local counsel should be consulted rather than relying on this list.



## **ANNEX 2-D**

### **Model Waivers of Confidentiality Protections**





**ANNEX 2-D**  
**MODEL WAIVER OF CONFIDENTIALITY PROTECTIONS**  
**TO PERMIT CONFIDENTIAL COMMUNICATIONS**  
**BETWEEN ANTITRUST ENFORCEMENT AGENCIES**

[Letterhead of Company Providing Waiver]

[Date]

[Lead Case Officer][Lead Case Officer]  
[U.S. Department of Justice][Antitrust Enforcement Agency Z]  
[Address][Address]

With respect to [the proposed acquisition of A Corp. by B Corp.] the undersigned attorney or corporate officer, acting on behalf of [indicate entity], hereby waives confidentiality protections under [insert names of applicable laws from both jurisdictions, e.g., the Hart-Scott-Rodino Act, 15 U.S.C. 18a(h), the Antitrust Civil Process Act, 15 U.S.C. §§ 1311 et seq., and any other applicable confidentiality provisions] (collectively “Confidentiality Rules”), solely to permit discussions between the staffs of the United States Department of Justice and [indicate antitrust enforcement agency Z] investigating [the proposed acquisition of A Corp. by B Corp.] under their respective merger review legislation [insert names of applicable laws from both jurisdictions, e.g., the Clayton Act] that would otherwise be foreclosed by the Confidentiality Rules of their respective jurisdiction.

[Indicate entity] grants this waiver on the understanding that the United States Department of Justice and [indicate antitrust enforcement agency Z] will continue to protect the confidentiality of [indicate entity]’s information vis-à-vis any other party in accordance with their normal practices and their respective Confidentiality Rules (see attached policy statement).

Signed:

Position:

Telephone:

**MODEL WAIVER OF CONFIDENTIALITY PROTECTIONS  
TO PERMIT LIMITED CONFIDENTIAL COMMUNICATIONS  
BETWEEN ANTITRUST ENFORCEMENT AGENCIES**

[Letterhead of Company Providing Waiver]

[Date]

[Lead Case Officer]  
[U.S. Department of Justice]  
[Address]

[Lead Case Officer]  
[Antitrust Enforcement Agency Z]  
[Address]

With respect to [the proposed acquisition of A Corp. by B Corp.] the undersigned attorney or corporate officer, acting on behalf of [indicate entity], hereby waives confidentiality protections under [insert names of applicable laws from both jurisdictions, e.g., the Hart-Scott-Rodino Act, 15 U.S.C. 18a(h), the Antitrust Civil Process Act, 15 U.S.C. §§ 1311 et seq., and any other applicable confidentiality provisions] (collectively “Confidentiality Rules”), solely to permit discussions on the following subjects: [insert list of the specific documents and/or products and issues -- e.g., market definition, barriers to entry, remedies, etc.] between the staffs of the United States Department of Justice and [antitrust enforcement agency Z] investigating [the proposed acquisition of A Corp. by B Corp.] under their respective merger review legislation [insert names of applicable laws from both jurisdictions, e.g., the Clayton Act] that would otherwise be foreclosed by the Confidentiality Rules of their respective jurisdictions.

[Indicate entity] grants this waiver on the understanding that the United States Department of Justice and [indicate antitrust enforcement agency Z] will continue to protect the confidentiality of [indicate entity]’s information vis-à-vis any other party in accordance with their normal practices and their respective Confidentiality Rules (see attached policy statement).

Signed:

Position:

Telephone:



**MODEL WAIVER OF CONFIDENTIALITY PROTECTIONS  
TO PERMIT EXCHANGES OF CONFIDENTIAL INFORMATION  
BETWEEN ANTITRUST ENFORCEMENT AGENCIES**

[Letterhead of Company Providing Waiver]

[Date]

[Lead Case Officer]  
[U.S. Department of Justice]  
[Address]

[Lead Case Officer]  
[Antitrust Enforcement Agency Z]  
[Address]

With respect to [the proposed acquisition of A Corp. by B Corp.] the undersigned attorney or corporate officer, acting on behalf of [indicate entity], hereby waives confidentiality protections under [insert names of applicable laws from both jurisdictions, e.g., the Hart-Scott-Rodino Act, 15 U.S.C. 18a(h), the Antitrust Civil Process Act, 15 U.S.C. §§ 1311 et seq., and any other applicable confidentiality provisions], (collectively, “Confidentiality Rules”), for the purpose of allowing the Antitrust Division of United States Department of Justice and [indicate foreign antitrust authority] to share documents, information and analyses.

Specifically, [indicate entity] authorizes the staffs of the United States Department of Justice and [indicate foreign antitrust authority] investigating [the proposed acquisition of A Corp. By B Corp.] under their respective merger review legislation [insert names of applicable laws from both jurisdictions, e.g., the Clayton Act] to share with one another [indicate entity] documents, graphics, statements and oral communications, and their own internal analyses of [indicate entity] materials whose disclosure would be otherwise foreclosed by the Confidentiality Rules of their respective jurisdictions.

[Indicate entity] grants this waiver on the understanding that the United States Department of Justice and [indicate antitrust enforcement agency Z] will treat [indicate entity] documents and information as being subject to all confidentiality protections to the fullest extent of their customary practices and Confidentiality Rules that would be applicable as if [indicate entity] had provided the information directly to them (see attached policy statement).

This authorization does not cover any materials asserted to be privileged, including correspondence sent to and from in-house counsel and in-house counsel legal advice provided ti satisfies the standards for attorney-client privilege or work product doctrine under U.S. law and is not a waiver of any rights to assert any applicable privileges pertaining to such materials, including the attorney work product or attorney client privileges.

Signed:  
Position:  
Telephone:



## **ANNEX 2-E**

### **Model Framework for Policy Statements**





**ANNEX 2-E**  
**MODEL FRAMEWORK FOR POLICY STATEMENTS**  
**TO BE ISSUED BY ANTITRUST ENFORCEMENT AGENCIES**  
**REGARDING WAIVERS OF CONFIDENTIALITY<sup>1</sup>**

**PREAMBLE**

This section should indicate the agency's willingness to use an internationally accepted model waiver to facilitate cooperation and its commitment to maintaining appropriate protection for confidential business information throughout this process. It would also affirm that the agency is not obligated to exchange or discuss confidential business information, and it may decline to do so where it is not in the public interest of the jurisdiction or for any other reason. Further, this section contemplates where a waiver has been granted, that the agency would affirm that if it becomes aware that confidential information has been improperly disclosed that it will promptly advise the other relevant agencies and/or parties of the disclosure so that its significance and implications for further information-sharing can be assessed.

**VOLUNTARINESS OF WAIVERS**

This section should confirm that the agency views waivers as a voluntary process which may be entered into when agencies and the parties believe that it will facilitate the review of a particular transaction or investigation. While agency personnel may identify cases and issues where they believe a waiver will be useful, the agency should make clear that no negative inference will be drawn from a party's decision not to grant a waiver.

**EXISTING STATUTORY CONFIDENTIALITY PROTECTIONS**

This section should describe and cite the applicable domestic confidentiality legislation/regulations with respect to: (i) disclosure of confidential information received from a merging party; and (ii) disclosure of confidential information received from another antitrust enforcement agency during a merger review. Any specific gaps in the protection of confidential information should be clearly identified so that merging parties can make an informed decision regarding the incremental disclosure risks which could result from granting a waiver (or providing confidential business information directly to the agency).

This section also should explain how the domestic confidentiality legislation/regulations are interpreted and applied in practice. Key issues would include the **definition of confidential information** and the **scope of discovery rules** (including the agency's policy and practice with respect to the use of confidential business information in complaints and accompanying court

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<sup>1</sup> At the invitation of the Advisory Committee, the Working Group of the Antitrust and Trade Committee of the International Bar Association prepared a recommended framework for policy statements. This model is based on their submission.

papers), **freedom-of-information laws** or other **exemptions** which may result in disclosure of information received from another agency or provided directly by the parties.

### **CUSTOMARY PRACTICES**

This section would affirm the agency's intention to refuse to disclose information except to the extent it is legally required to do so, to use best efforts to resist disclosure to third parties (including the assertion of any privilege claims or disclosure exemptions which may apply), and to provide such notice as is practicable prior to disclosure of any confidential business information. This section also would explain how concepts such as using best efforts to resist disclosure to third parties are implemented on a domestic basis. This section also would state the agency's practice with respect to the destruction of documents at the end of the investigation.

The policy statement should be updated when there are material developments in the manner in which particular provisions of the model waiver are interpreted and applied.



## **ANNEX 3-A**

### **Filing Fees of Selected Jurisdictions**



**ANNEX 3-A**  
**FILING FEES OF SELECTED JURISDICTIONS**

<b>JURISDICTION</b>	<b>FILING FEE</b>	<b>FILING FEE (US\$)</b>
Australia	AUD 15,000	\$9,676
Austria	ATS 1,000 for Phase 1, ATS 20,000 - 400,000 for Phase 2	\$77, \$1,549 - \$30,982
Brazil	BRL 15,000 - 18,000	\$8,339 - \$10,000
Canada	CDN 25,000	\$16,821
Croatia	Up to HRK 1 million	\$140,462
Czech Republic	CSK 50,000	\$1,438
Germany	DEM 10,000 - 100,000	\$5,449 - \$54,495
Hungary	HUF 500,000	\$2,108
Ireland	IEP 4,000	\$5,413
Mexico	USD 8,842	\$8,842
New Zealand	Application for clearance: NZ\$2,250 Application for authorization: NZ\$22,500	\$1,190  \$11,900
Romania	ROL 6.5 million plus 1% of parties' turnover	\$424
Slovak Republic	SKK 15,000 - 50,000	\$363 - \$1,209
South Africa	ZAR 5,000 - 500,000	\$817 - \$81,744
Switzerland	No fee if Phase 1 clearance, Fee due if Phase 2 proceedings open	
United Kingdom	GBP 5,000 - 15,000	\$8,090 - \$24,269
United States	USD 45,000	

\* Conversion rates are year-end average 1999.

Source: Submission by Barry Hawk, Skadden, Arps, Slate, Meagher & Flom, "Reforming Merger Control to Reduce Transaction Costs," ICPAC Hearings (Nov. 3, 1998).





## **ANNEX 3-B**

# **The Relationship Between Antitrust Agencies and Sectoral Regulators**





**ANNEX 3-B**  
**THE RELATIONSHIP BETWEEN**  
**ANTITRUST AGENCIES AND SECTORAL REGULATORS<sup>1</sup>**

In a number of sectors, public competition authorities share responsibility for formulating and implementing merger policy with other government agencies. Shared authority appears most often in industries that previously have been the subject of comprehensive regulation that governs entry, exit, and rate making. Prominent illustrations are described below.

*Airlines.* The Department of Transportation (DOT) has exclusive authority to approve agreements between U.S. airlines and foreign carriers<sup>2</sup> and to grant antitrust immunity for such agreements.<sup>3</sup> In these matters, DOJ plays an advisory role exclusively.

*Electric Power.* Transactions involving energy companies are subject to competition policy review or challenge by:

- One of the federal antitrust agencies (both DOJ and the FTC have reviewed transactions involving electric power producers);
- The Federal Energy Regulatory Commission (FERC);<sup>4</sup>
- For some transactions, the Securities and Exchange Commission (exercising powers granted by the Public Utility Holding Company Act);<sup>5</sup>
- The public service commission (PSC) of each state in which the parties do business (although it is not clear under the law of several states whether remedial action can be ordered by a single PSC over a multistate company);
- As with other mergers, the attorney general of each state in which the parties do business (the attorney general may develop a policy position independent from and inconsistent with the position adopted by the public service commission); and

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<sup>1</sup> Source: William E. Kovacic, "The Impact of Domestic Institutional Complexity on the Development of International Competition Policy Standards," (submission of March 15, 1999).

<sup>2</sup> 49 U.S.C. app. § 41309 (1994).

<sup>3</sup> *Id.* at § 41308.

<sup>4</sup> 16 U.S.C. §§ 791a-828c (1994).

<sup>5</sup> 15 U.S.C. §§ 79i, 79j (1994).

- As with other mergers, private entities, such as competitors to the merging parties.

Review by each of these potential challengers is nonexclusive. Acquiescence in a transaction by any one entity does not preclude a separate challenge by any of the other entities. Approval of a transaction by one entity subject to one set of concessions does not preclude another entity from insisting upon further concessions.

*Financial Services.* DOJ shares competition policy jurisdiction over mergers involving banks with four federal banking regulators: the Office of the Comptroller of the Currency, which reviews transactions involving national banks; the Federal Deposit Insurance Corporation, which reviews transactions involving federally-insured, state-chartered banks that are not members of the Federal Reserve System; the Board of Governors of the Federal Reserve System, which reviews transactions involving bank holding companies and state-chartered banks that are members of the Federal Reserve System; and the Office of Thrift Supervision which reviews transactions involving savings and loan companies and savings associations.<sup>6</sup> In general, the banking regulators apply standards similar to those established under § 7 of the Clayton Act and must consider a report filed by DOJ before completing their own assessment of a transaction.

*Railroads.* Jurisdiction over mergers involving railroads resides solely in the Surface Transportation Board (STB).<sup>7</sup> The DOJ provides nonbinding advice to the STB, which must consider, but need not heed, DOJ's recommendations.

*Telecommunications.* Mergers involving telecommunications service providers usually are subject to competition policy review or challenge by:

- One of the federal antitrust agencies (only the DOJ has jurisdiction to review mergers involving telephone companies; both the DOJ and the FTC have reviewed mergers between cable television firms);
- The Federal Communications Commission (FCC);<sup>8</sup>
- The PSC of each state in which the parties do business (although most state PSCs lack jurisdiction over cable television mergers and some lack jurisdiction over mergers);

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<sup>6</sup> See II ABA Antitrust Section, Antitrust Law Developments 1233-40 (4th ed. 1997).

<sup>7</sup> 49 U.S.C. § 11321 (West. 1997).

<sup>8</sup> See ABA Antitrust Section, Antitrust Law Developments, at 1160-66 (describing allocation of authority established by the 1996 Telecommunications Act).

- In the case of cable television, county and municipal authorities with responsibility for granting and overseeing cable franchise agreements;
- The attorney general of each state in which the merging parties do business; and
- Private entities such as competitors to the merging parties.

As with mergers involving electric power firms, review by any of these entities is nonexclusive. Approval of a transaction by one entity does not preclude a separate challenge by any of the other entities, nor does it bar another entity from seeking adjustments that exceed concessions that resolved the concerns of other bodies.

### **A DETAILED ILLUSTRATION: THE CASE OF TELECOMMUNICATIONS**

Recent experience with consolidation in the telecommunications sector illustrates the intricacies of merger review with multi-jurisdictional oversight. Major transactions such as AT&T/TCI, Bell Atlantic/NYNEX, Bell Atlantic/GTE, and SBC/Ameritech have engaged the energies of many of the public institutions that formulate telecommunications competition policy and, in some instances, have elicited private challenges. Presented below is a description of the process by which the various institutional gatekeepers would consider a merger between two telecommunications services providers. This example assumes that both parties provide local telephone service.

#### **1. Review by Federal Antitrust Officials**

The merging parties ordinarily set the merger review process in motion by filing premerger notification forms with the federal antitrust agencies. DOJ and the FTC allocate the review of specific mergers through a “clearance” process that emphasizes comparative expertise. Since the FTC lacks jurisdiction over common carriers, DOJ would receive clearance to examine the transaction in detail. In reviewing transactions under the Hart-Scott-Rodino premerger notification mechanism, the federal antitrust agencies are subject to statutory time constraints. DOJ and the FTC have authority to attack a merger after the mandatory waiting periods (or timing agreements to extend the waiting periods) have expired, but neither agency has exercised that power for an HSR-reportable transaction since the HSR mechanism took effect in 1977.

When they sue in federal district court to halt mergers, the federal agencies must establish the liability standard of § 7 of the Clayton Act and demonstrate their entitlement to relief by a preponderance of the evidence. The FTC also has the option of initiating administrative litigation, where the Commission’s decisions are subject to review by the courts of appeals under the deferential standard of review accorded to administrative agencies.



## 2. Review by the Federal Communications Commission

The parties to a merger requiring FCC approval have discretion to choose when to submit their transaction for the Commission's review. In some instances, the merging parties submit their requests for approval to the FCC at the same time that they make their HSR filings with the federal antitrust regulators. In other cases, they await the results of the federal antitrust agency review before approaching the FCC. No time limits constrain the FCC's analysis of mergers which require the Commission's approval.<sup>9</sup>

For reasons of policy and practical reality, the scope of competition policy review by the federal antitrust agencies is a subset of the scope of competition policy review that the FCC can exercise under its public interest mandate. The FCC applies a public interest standard under the Federal Communications Act in evaluating specific transactions. This test allows the Commission to account for competition policy concerns as well as a host of social and economic policy factors extending beyond the bounds of traditional antitrust analysis. Non-competition policy factors include the impact of the merger on the parties' incentives and ability to serve vulnerable user groups (such as low-income individuals), the parties' commitment to sustain high levels of residential service quality while pursuing business customers, and the parties' willingness to provide service and business opportunities to historically disadvantaged minorities and other social groups. FCC decisions in evaluating competition and non-competition factors are reviewed by the courts of appeals under the deferential standard of review according to administrative bodies.

In examining competition policy factors, the FCC sometimes has the benefit of a completed antitrust agency review of the same transaction. For example, where DOJ and the parties resolve DOJ's competition policy concerns by settlement, the FCC ordinarily will know of the settlement terms when they are published for public comment. The HSR statute bars DOJ from giving the FCC material obtained from the parties as part of the premerger notification and second request process. However, the FCC sometimes insists that the parties provide such material to enable the Commission to perform its analysis of the transaction. As FCC approval is essential for the transaction to proceed, parties typically provide the requested HSR documents. These materials become part of the record of the FCC proceeding and are available for review by those who sign protective orders.

Compared to Clayton Act oversight by the federal antitrust agencies, FCC exercise of competition policy oversight under the Communications Act's public interest standard is potentially more restrictive in several respects. The public interest test seems to impose a more expansive substantive liability standard than the Clayton Act's antimerger provision. FCC officials have stated that, to satisfy the public interest standard, the merging parties must show that a proposed transaction will boost competition. By contrast, federal antitrust officials bring actions to challenge mergers only when, to paraphrase § 7 of the Clayton Act, they may substantially reduce competition. The

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<sup>9</sup> Senator Herbert Kohl has proposed legislation that would require the FCC to issue decisions on mergers within six months.

Clayton Act test imposes no duty on the merging parties to demonstrate that a transaction will increase competition. Since its decisions are reviewed as administrative decisions, whereas the FTC or DOJ bears the burden of proof in an antitrust action, the FCC can avail itself of a more favorable evidentiary standard than DOJ or the FTC can use in a federal district court proceeding.

The FCC's competition policy review also derives distinctive power from the nature of its procedures and time-sensitive quality of many mergers. Because there is no time limit on its review of transactions, parties to mergers under FCC review have stronger incentives to make concessions to the FCC than they have to make concessions to the federal antitrust agencies. This is true even when the FCC relies on analytical concepts of doubtful validity. Mergers often are time-sensitive transactions, and long delays in achieving approval are costly. Among other adverse effects, delay limits the parties' ability to implement new strategies and increases the risk that employees who are uncertain about their future position with the new entity will seek other jobs.

In theory, the parties could elicit an unfavorable FCC decision and challenge questionable enforcement theories before the court of appeals. In practice, the prospect of spending a year or more to obtain a negative ruling from the Commission and then taking an additional year to gain an appellate decision is unacceptable. Consequently, the FCC can rely on debatable competition policy enforcement theories (such as expansive notions of potential competition) safe in the knowledge that such theories are unlikely to be tested before an appellate tribunal.

### **3. Review by State Sectoral Regulators**

The merging parties usually approach state public service commissions at the same time that they begin seeking approval from the FCC. The competition policy reviews conducted by state public service commissions resemble the review by the FCC. State PSCs operate under a public interest standard that embraces a large collection of competition policy factors and other considerations. State PSC reviews ordinarily are not subject to time constraints, and the delay associated with seeking judicial review of PSC decisions tends to impel the merging parties to make desired concessions.

### **4. Review by the State Attorneys General**

The preferences of the state PSC sometimes, but not always, reflect the preferences of the state attorney general. Merging parties must account for the possibility that the state attorney general may insist on concessions that exceed the concessions demanded by the state PSC.

### **5. Challenges by Competitors**

A final element in the calculus for the merging parties is to assess the possibility that a merger proposal will elicit a private antitrust suit by a competitor. Competitors must surmount opposition based on standing and antitrust injury requirements.





## **ANNEX 4-A**

### **U.S. International Cartel Prosecutions During the 1990s**



## ANNEX 4-A

### U.S. Prosecutions in International Cartel Matters • FY 1990 to Date

Based on Antitrust Division public records,\* international cartel prosecutions filed during the 1990s (and the *fiscal years (FY)* in which the *first charges* were filed) include the following:

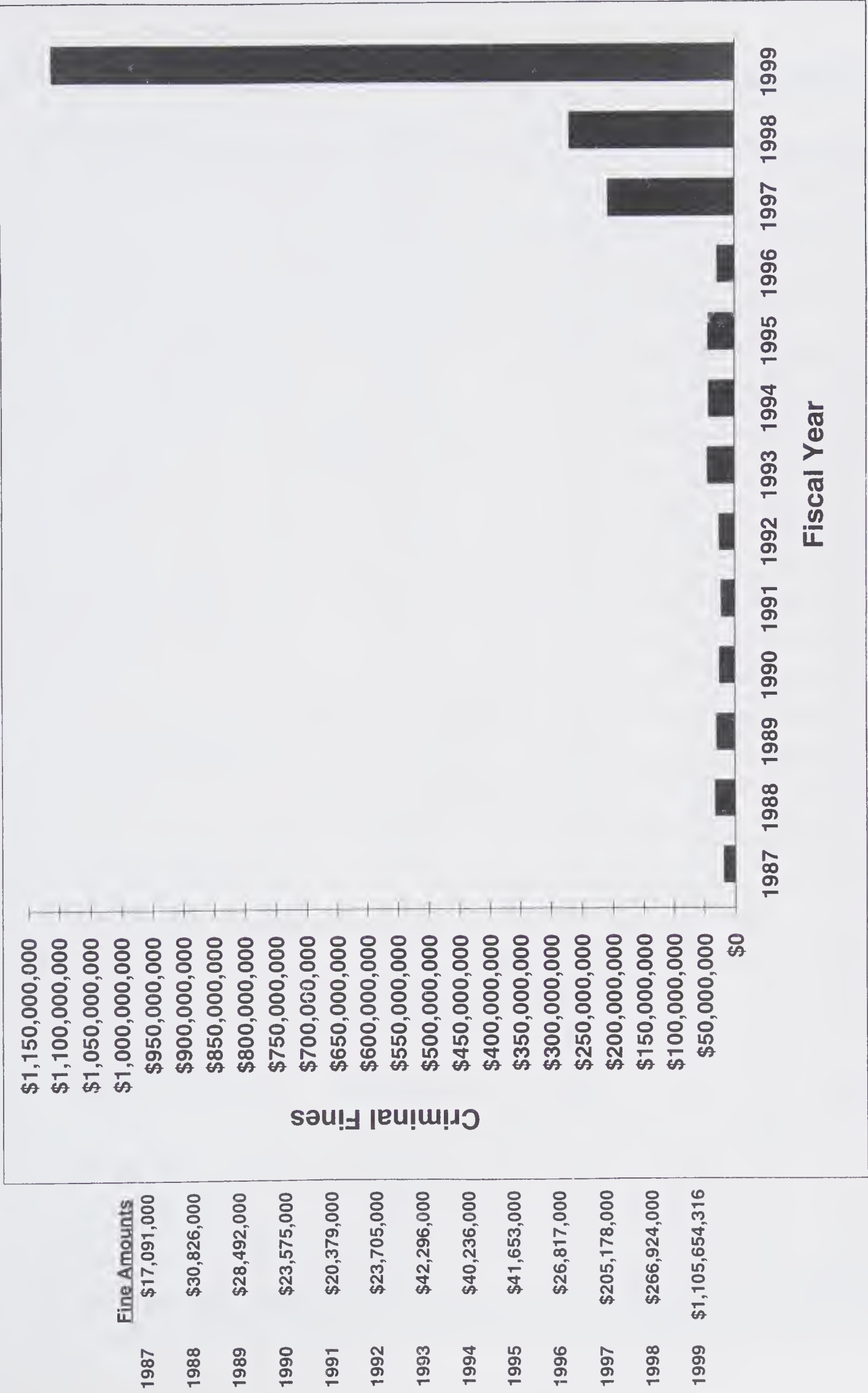
FY 1991:	Federal Dam Repair Project
FY 1992:	Bronze & Copper Flake Moving Services
FY 1993:	Aircraft Purchases at Bankruptcy Auctions
FY 1994:	Aluminum Phosphide Industrial Diamonds Disposable Plastic Dinnerware; Thermal Fax Paper
FY 1995:	Lysine (Food and Feed Additives) Citric Acid (Food and Feed Additives) Commodity Ferrosilicon Products Rare Banknotes Auction
FY 1996:	Tampico Fiber
FY 1997:	Sodium Gluconate
FY 1998:	Graphite Electrodes Marine Construction Marine Transportation Sorbates Vitamins
FY 1999:	Maltol Sodium Erythorbates Cable Stay Bridges Magazines

\* Compiled by Advisory Committee staff (Oct. 1, 1999). This information is based on materials about Antitrust Division cartel cases obtained from the Antitrust Documents Group, U.S. Department of Justice. In reaching determinations about which investigations fall within the category of *international cartel cases*, the Advisory Committee staff applied the definition for “international” matters furnished by the Antitrust Division’s Executive Office. See Chapter 4, n [12].





# Antitrust Division Criminal Fines



Prepared by U.S. Department of Justice, Antitrust Division (September 1999)





**U.S. DEPARTMENT OF JUSTICE ANTITRUST DIVISION  
SHERMAN ACT VIOLATIONS YIELDING A FINE OF \$10 MILLION OR MORE**

<b>Defendant (FY)</b>	<b>Product</b>	<b>Fine (\$Millions)</b>	<b>Geographic Scope</b>	<b>Country</b>
F. Hoffmann-La Roche Ltd. (1999)	Vitamins	\$500	Int'l.	Switzerland
BASF AG (1999)	Vitamins	\$225	Int'l.	Germany
SGL Carbon AG (1999)	Graphite Electrodes	\$135	Int'l.	Germany
UCAR Int'l., Inc. (1998)	Graphite Electrodes	\$110	Int'l.	U.S.
Archer Daniels Midland Co. (1997)	Lysine & Citric Acid	\$100	Int'l.	U.S.
Takeda Chemical Industries, Ltd (1999)	Vitamins	\$72	Int'l.	Japan
Haarmann & Reimer Corp. (1997)	Citric Acid	\$50	Int'l.	German Parent
HeereMac v.o.f. (1998)	Marine Construction	\$49	Int'l.	Netherlands
Eisai Co., Ltd. (1999)	Vitamins	\$40	Int'l.	Japan
Hoechst AG (1999)	Sorbates	\$36	Int'l.	Germany
Showa Denko Carbon, Inc. (1998)	Graphite Electrodes	\$32.5	Int'l.	Japan
Daiichi Pharmaceutical Co., Ltd. (1999)	Vitamins	\$25	Int'l.	Japan
Nippon Gohsei (1999)	Sorbates	\$21	Int'l.	Japan
Pfizer Inc. (1999)	Maltol/Sodium Erythorbate	\$20	Int'l.	U.S.
Fujisawa Pharmaceuticals Co. (1998)	Sodium Gluconate	\$20	Int'l.	Japan
Dockwise N.V. (1998)	Marine Transportation	\$15	Int'l.	Belgium
Dyno Nobel (1996)	Explosives	\$15	Dom.	Norwegian Parent
F. Hoffmann-La Roche, Ltd. (1997)	Citric Acid	\$14	Int'l.	Switzerland
Eastman Chemical Co. (1998)	Sorbates	\$11	Int'l.	U.S.
Jungbunzlauer Int'l. (1997)	Citric Acid	\$11	Int'l.	Switzerland
Lonza AG (1998)	Vitamins	\$10.5	Int'l.	Switzerland
Robert J. Koehler CEO, SGL Carbon AG (1999)	Graphite Electrodes	\$10	Int'l.	Germany
Akzo Nobel Chemicals, BV & Glucona, BV (1997)	Sodium Gluconate	\$10	Int'l.	Netherlands
Mrs. Baird's Bakeries (1996)	Bread	\$10	Dom.	U.S.
Ajinomoto Co., Inc. (1996)	Lysine	\$10	Int'l.	Japan
Kyowa Hakko Kogyo, Co., Ltd. (1996)	Lysine	\$10	Int'l.	Japan
ICI Explosives (1995)	Explosives	\$10	Dom.	British Parent

Prepared by ICPAC staff (November 1999) based on "Antitrust Division: Sherman Act Violations Yielding a Fine of \$10 Million or More" (chart Sept. 1999) received from the U.S. Department of Justice Antitrust Division, Office of Criminal Enforcement.



## **ANNEX 4-B**

# **U.S. Corporate Leniency Program and Antitrust Penalties in Select Jurisdictions**





## ANNEX 4-B

### **Key Aspects of Revised U.S. Antitrust Division Corporate Leniency Program<sup>1</sup>**

*Leniency Before an Investigation Has Begun* or *Part 'A'* amnesty will be granted automatically to a corporation reporting illegal activity before an investigation has begun, if the following six conditions are met: (1) At the time the corporation comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other source; (2) the corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity; (3) the corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation; (4) the confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials; (5) where possible, the corporation makes restitution to injured parties; and (6) the corporation did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity.

*Alternative Requirements for Leniency* or *Part 'B'* leniency may be available if a corporation comes forward to report illegal antitrust activity and does not meet all six of the conditions set out in Part A. The corporation, whether it comes forward before or after an investigation has begun, will be granted leniency if the following seven conditions are met: (1) The corporation is the first one to come forward and qualify for leniency with respect to the illegal activity being reported; (2) the Division, at the time the corporation comes in, does not yet have evidence against the company that is likely to result in a sustainable conviction; (3) the corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity; (4) the corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation that advances the Division in its investigation; (5) the confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials; (6) where possible, the corporation makes restitution to injured parties; and (7) the Division determines that granting leniency would not be unfair to others, considering the nature of the illegal activity, the confessing corporation's role in it, and when the corporation comes forward.

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<sup>1</sup> U.S. Department of Justice Antitrust Division, CORPORATE LENIENCY POLICY (August 10, 1993).





COMPARISON OF ANTICARTEL PENALTIES IN SELECT JURISDICTIONS						
Country	What Is The Maximum Fine For Corporations?	What Products Included In Calculating Fine?	What Markets Included In Calculating Fine?	For What Time Period?	Individual Liability Imposed? What Is The Maximum Penalty?	Amnesty or Leniency Policy?
US	The largest of: (1) USD \$10 million; (2) twice the gross gain derived by the cartel members from the crime; <u>or</u> (3) twice the gross loss suffered by the crime victims	Limited to sales of products/services affected by violation (the “volume of affected commerce”)	U.S. commerce only, unless this grossly understates seriousness of firm’s role in offense, then worldwide sales	Duration of the cartel	Yes. 3 yrs imprisonment and a fine the greatest of: (1) USD \$350,000; (2) twice gross gain derived by the cartel members from the crime; <u>or</u> (3) twice the gross loss suffered by the crime victims	Yes
Canada	(1) Conspiracy (price fixing, market share, customer allocation) not to exceed CAD \$10 million (2) Bidrigging fine in discretion of the court	Limited to sales of products/services affected by violation	Canadian commerce only, unless this grossly understates seriousness of firm’s role in offense, then worldwide sales	Duration of the cartel	Yes. Conspiracy and bidrigging (1) same fines as for corporations, or (2) imprisonment for a term not exceeding 5 yrs., or (3) both	Yes
EU	10% of turnover for the company	“Turnover” means total sales of the company	Worldwide commerce	One preceding year	No	Yes
France	5% of turnover for the company, up to maximum of FF 10 million	“Turnover” means total sales of the company	French commerce only	One preceding year	Yes. 4 yrs imprisonment and a fine of FF 500,000	No
Germany	DM 1 million, plus up to 3 times the additional receipts	Limited to sales of products/services affected by violation	German commerce only	Duration of the cartel	Yes. DM 1 million, plus up to 3 times the additional receipts	No
Japan	Admin. Surcharge: 6% of the affected sales (3% for small companies)	Admin: Limited to sales of products/services affected by violation	Admin: Japanese commerce only	Admin: Duration of cartel, up to max. of 3 yrs.	Administrative: No.	No
	Criminal Fine: ¥100 million	Crim: No sentencing guidelines	Crim: No sentencing guidelines	Crim: Duration of Cartel	Criminal: Yes. 3 years imprisonment and ¥5 million	
UK [draft] to take effect 3/00]	10% of turnover for the company, up to maximum of 3 yrs.	“Turnover” means total sales of the company	UK commerce only	Duration of cartel, up to max. of 3 yrs.	No	[Yes, as drafted]

Prepared by ICPAC staff (November 1999) based on "International Fines in Cartel Enforcement Matters - Comparison Table" prepared by U.S. Dept. of Justice, Antitrust Division, Office of Criminal Enforcement (Sept. 30, 1999).



## **ANNEX 4-C**

### **Anticartel Enforcement in Canada and Japan**





**ANNEX 4-C**  
**CANADIAN COMPETITION BUREAU**  
**PENALTIES IMPOSED IN CASES AGAINST INTERNATIONAL CARTELS**  
**FOR VIOLATIONS OF THE COMPETITION ACT**

Date	Company/Individual	Product	Section of the Act	Penalty
1999 Oct 27	Andreas Hauri (Swiss national and former executive of Hoffmann-La Roche Ltd)	Bulk Vitamins Citric Acid	45(1)(c)	\$175,000 \$75,000  Total: \$250,000
1999 Oct 26	Roussel Canada Inc. (Canada)	Bulk Vitamins	46(1)	\$370,000  Total: \$370,000
1999 Oct 26	Hoechst AG (Germany) Eastman Chemical Company (United States)	Sorbates	45(1)(c)	\$2,500,000 \$780,000  Total: \$3,280,000
1999 Oct 25	Dr. Roland Brönnimann (Swiss national and former executive of Hoffmann-La Roche Ltd)	Bulk Vitamins	45(1)(c)	\$250,000  Total: \$250,000
1999 Sept 24	Chinook Group Limited (Canada)	Choline Chloride	45(1)(c)	\$2,250,000  Total: \$2,250,000
1999 Sept 22	F. Hoffmann-La Roche Ltd (Switzerland) BASF Aktiengesellschaft (Germany) Rhône-Poulenc S.A. (France) Daiichi Pharmaceutical Co., Ltd. (Japan) Eisai Co., Ltd. (Japan)	Bulk Vitamins	45(1)(c)	\$48,000,000 \$18,000,000 \$14,000,000 \$2,500,000 \$2,000,000
1999 Sept 22	BASF Aktiengesellschaft (Germany)	Choline Chloride	45(1)(c)	\$1,000,000  Total: \$1,000,000
1999 Sept 22	F. Hoffmann-La Roche Ltd (Switzerland)	Citric Acid	45(1)(c)	\$2,900,000  Total: \$2,900,000
1999 Sept 17	Russell Cosburn (Canadian and former executive of Chinook Group Limited)	Choline Chloride	45(1)(c)	nine months prison and 50 hours of community service

## Annex 4-C

Date	Company/Individual	Product	Section of the Act	Penalty
1999 July 23	Akzo Nobel Chemicals B.V. (The Netherlands) Glucona B.V. (The Netherlands)	Sodium Gluconate	45(1)(c)	\$350,000 \$350,000  Total: \$700,000
1999 May 25	Roquettes Frères (France)	Sodium Gluconate	45(1)(c)	\$700,000  Total: \$700,000
1999 March 18	UCAR Inc. (Canada)	Graphite Electrodes	46(1)	\$11,000,000  Total: \$11,000,000
1999 Feb 15	Fujisawa Pharmaceutical Co. Ltd. (Japan)	Sodium Gluconate	45(1)(c)	\$360,000  Total: \$360,000
1998 Oct 21	Jungbunzlauer International AG (Switzerland)  Haarmann & Reimer Corporation (United States)	Sodium Gluconate Citric Acid  Citric Acid	45(1)(c)	\$100,000 \$1,900,000  \$4,700,000  Total: \$6,700,000
1998 July 23	Ajinomoto Co. Inc. (Japan) Sewon America Inc. (United States)	Lysine	45(1)(c)	\$3,500,000 \$70,000  Total: \$3,570,000
1998 May 27	Archer Daniels Midland Company (United States)	Lysine  Citric Acid	45(1)(c)	\$14,000,000  \$2,000,000  Total: \$16,000,000
1997 Feb 17	Mitsubishi Paper Mills, Ltd. ( Japan)	Fax Paper	45(1)(c) 61(1)(b)	\$750,000 \$100,000  Total: \$850,000
1996 July 16	New Oji Paper Company Limited (Japan)	Fax Paper	45(1)(c)	\$600,000  Total: \$600,000
1995 Dec 18	Rittenhouse Ribbons & Rolls Ltd. (Canada)	Fax Paper	61(6)	\$98,000  Total: \$98,000



*Annex 4-C*

Date	Company/Individual	Product	Section of the Act	Penalty
1995 Sept 27	Canada Pipe Company Ltd. (Canada)	Pipe	45(1)(c)	\$2,500,000  Total: \$2,500,000
1994 Aug 5	Mitsubishi Corporation (Japan)  Mitsubishi Canada Limited (Canada)	Fax Paper	45(1)(c) 46(1) 61(1)(b) 61(1)(b)	\$500,000 \$250,000 \$125,000 \$75,000  Total: \$950,000
1994 July 12	Kanzaki Specialty Papers Inc. (United States)	Fax Paper	45(1)(c)	\$950,000  Total: \$950,000
1993 Nov 19	Sumitomo Canada Limited (Canada)	Chemical Insecticide	46(1)	\$1,250,000  Total: \$1,250,000
1993 June 11	Chemagro Limited (Canada)	Chemical Insecticide Biological Insecticide	46(1) 45(1)(c)	\$1,250,000 \$750,000  Total: \$1,250,000

Prepared by the Canadian Competition Bureau (Jan. 2000)

Available through the Competition Bureau's Web Site <<http://competition.ic.gc.ca>>



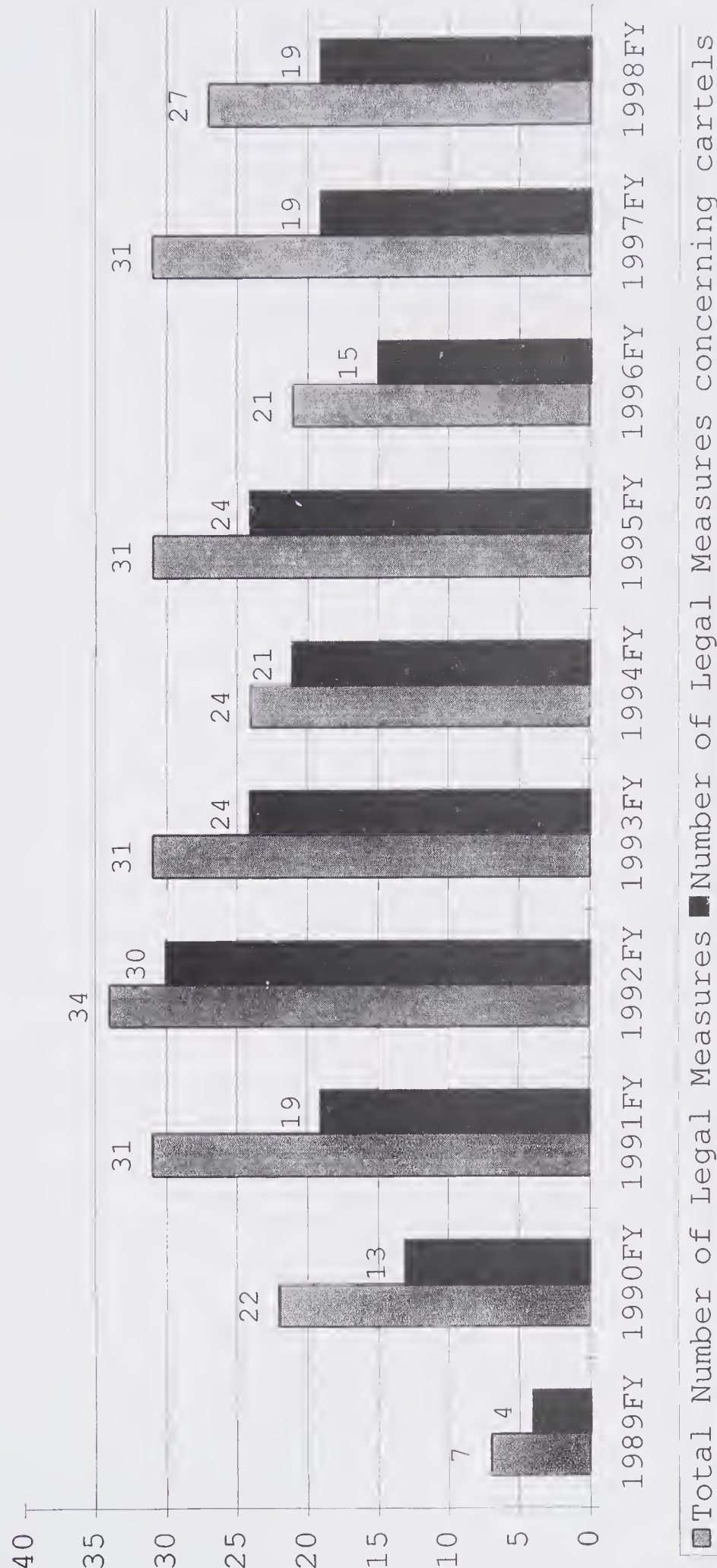
# JAPAN FAIR TRADE COMMISSION - ENFORCEMENT STATISTICS

FY 1989 - FY 1998

(PREPARED BY JFTC, JANUARY 2000)

Annex 4-C

TABLE 1: Number of Legal Measures



"Legal Measures" includes recommendations and surcharge payment orders issued without cease and desist order

Note: "Recommendations" are formal findings of a violation of the Anti-Monopoly Act and are accompanied by a cease and desist order. In situations where the one year prescription period for cease and desist orders expires before the JFTC takes action, the JFTC may still make a formal finding of an Anti-Monopoly Act violation and impose a "surcharge" (administrative fine).





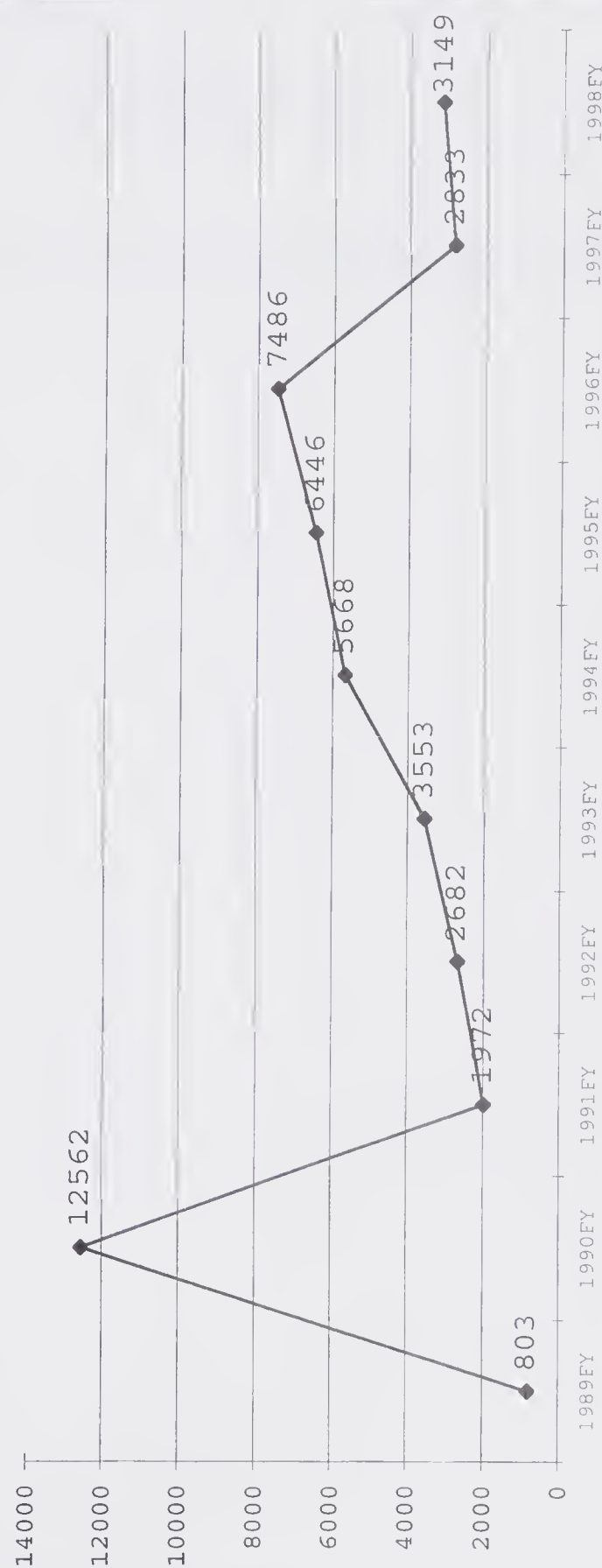
## JAPAN FAIR TRADE COMMISSION - SURCHARGE STATISTICS

FY 1989 - FY 1998

(PREPARED BY JFTC, JANUARY 2000)

amount of surcharges (million yen)	1989FY	1990FY	1991FY	1992FY	1993FY	1994FY	1995FY	1996FY	1997FY	1998FY
	803	12562	1972	2682	3553	5668	6446	7486	2833	3149

TABLE 2: amount of surcharges (million yen)



Note: "Surcharges" (administrative fines) are imposed automatically by the JFTC on enterprises found to have engaged in horizontal collusive practices that affect price in violation of the Anti-Monopoly Act. The surcharge amount is assessed on the basis of a statutorily-fixed percentage (1% - 6%) of the amount of each firm's respective sales involved in the violation, depending on the sector involved and the size of the firm.





## **ANNEX 5-A**

### **Summary of Outbound Restraint Cases**



## ANNEX 5-A

### SUMMARY OF OUTBOUND RESTRAINT CASES

#### U.S. Government Enforcement Against Foreign Export Restraints

The Advisory Committee has examined the record of antitrust cases filed by the United States and identified 44 cases since 1912 in which the United States claimed that defendants were engaged in conduct that restrained U.S. exports abroad.<sup>1</sup> The cases deal with several types of practices, including allegations of anticompetitive conduct that also affects U.S. domestic commerce.<sup>2</sup> Indeed, many of the cases include a combination of U.S. and foreign companies acting in concert to limit competition in a particular industry.

Many of the early cases with export restraint allegations involve international cartels. Two cases from the 1950s established strong precedents for modern-day prosecution of international cartels. In *United States v. Timken Roller Bearing Co.*, the U.S. brought a civil action against a U.S. company (the major producer of tapered roller bearings) alleging that the company and its European affiliates had violated the Sherman Act by allocating geographic territories, fixing prices and restraining U.S. imports and exports. The district court found that these actions violated Sherman Act. The Supreme Court upheld the lower court decision.<sup>3</sup> In *United States v. Minnesota Mining & Mfg. Co.*, the U.S. government challenged an agreement among American manufacturers controlling 80 percent of export trade in coated abrasives; these companies agreed to establish jointly owned factories abroad and to refrain from exporting from the United States to countries where such plants were located. A federal district court held this arrangement to be illegal under the Sherman Act.<sup>4</sup>

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<sup>1</sup> See Antitrust Cases Filed by the U.S. Involving Export Restraint Allegations, Memorandum prepared by ICPAC Staff for the December 16, 1998 Advisory Committee meeting. Document available from Antitrust Public Documents Group, U.S. Department of Justice. This memorandum does not purport to be an exhaustive survey of U.S. antitrust enforcement actions.

<sup>2</sup> See e.g., *United States v. General Electric Co.*, 1962 Trade Cas. (CCH) ¶¶ 70342; 70546 (S.D.N.Y. 1962).

<sup>3</sup> *United States v. Timken Roller Bearing Co.*, 83 F. Supp. 284 (N.D. Ohio 1949), *modified* 341 U.S. 593, 71 S. Ct. 971 (1951). The Supreme Court, however, reversed the district court's order that the defendant be required to divest itself of all interests in the foreign corporations who participated in the conspiracy.

<sup>4</sup> *United States v. Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947 (D. Mass 1950), *amended*, 96 F. Supp. 356 (D. Mass. 1951). Another well-known enforcement action against a cartel from this period is *United States v. The Watchmakers of Switzerland Information Center*. In this case, the United States alleged a variety of anticompetitive agreements between Swiss and American watch makers. The U.S. alleged that these agreements were intended to prevent new competition in the U.S., fix prices of Swiss watches in the U.S. and to prevent exports of U.S.-produced watches to Switzerland and elsewhere. The court found that both the U.S. and Swiss defendants violated the Sherman Act.



The Advisory Committee was able to find only five cases since 1978 that involved export restraint allegations.<sup>5</sup> In a 1978 case, the United States launched a civil case against Westinghouse Electric Corp. and two Japanese firms, alleging that they had engaged in cross-licensing of patents in order to restrict imports of Mitsubishi products into the United States and imports of Westinghouse and other products into Japan. The complaint was dismissed because the government failed to show that the cross-licensing in this case violated the antitrust laws. In another 1978 case, the U.S. filed an information charge against Gulf Oil, alleging that Gulf had participated in an international cartel that fixed prices on foreign-source uranium shipments to the United States and refused to deal with U.S. uranium “middlemen,” including Westinghouse, which sought to purchase foreign uranium for reexport to its reactor customers overseas. The complaint charged that the effects of Gulf’s conduct were to stabilize prices and allocate uranium sales among the cartel members. The case was terminated with a *nolo contendere* plea and a fine.

In a 1979 case, *United States v. Bechtel*, the United States brought a civil case against Bechtel and three of its affiliated construction firms, alleging that they had violated the Sherman Act by conspiring to refuse to deal with U.S. subcontractors blacklisted by Arab League countries pursuant to the Arab boycott of Israel, and by requiring their subcontractors to do the same. The government said that the conspiracy restrained U.S. export of construction services and equipment by the boycotted firms to those Arab countries. The case was settled by a consent decree prohibiting the defendants from participating in the Arab boycott. In a 1982 case, *United States v. C. Itoh & Co., Ltd.*, the United States brought a civil case against eight Japanese importers of Alaskan seafood products, alleging that the defendants had fixed the prices they paid U.S. seafood processors for exported crab. The case was settled by a consent decree enjoining the defendants from fixing prices and exchanging certain price information.

The fifth case, *United States v. Pilkington PLC*, is the only case involving export restraint allegations since the Justice Department eliminate footnote 159 and clarified that its definition of harm included both consumers and firms.<sup>6</sup> In a 1994 case, the Department of Justice charged the U.K. firm Pilkington with entering into unreasonably restrictive patent and know-how licensing agreements with its likely competitors for the manufacture of flat glass using a proprietary process. The Department alleged that the territorial and use limitations in the agreements precluded Pilkington’s licensees in the United States from competing for business to design, build and operate flat glass plants in other countries. This was not a pure export case because the complaint also

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<sup>5</sup> *United States v. Westinghouse Electric Corp.*, 471 F.Supp. 532 (N.D. Cal 1978), *affirmed in part, reversed in part*, 648 F.2d 642 (9<sup>th</sup> Cir. 1981); *United States v. Gulf Oil Corp.*, [1970-79 Transfer Binder] Trade Reg. Rep. (CCH) ¶45,078, Case No. 2640 (W.D. Pa. 1978); *United States v. Bechtel Corp.*, 1979-1 Trade Cas. (CCH) ¶¶62,649, 62,430 (N.D. Cal. 1979), *affirmed*, 648 F.2d 660 (9<sup>th</sup> Cir.), *cert. denied*, 454 U.S. 1083 (1981); *United States v. C. Itoh & Co., Ltd.*, 198203 Trade Cas. (CCH) ¶65,010 (W.D. Wash 1982); *United States v. Pilkington PLC*, 1994-2 Trade Cas. (CCH) ¶70,842 (D.Ariz 1994).

<sup>6</sup> There have been investigations initiated by the United States but continued or completed by a foreign jurisdiction’s competition authority. See Discussion of Nielsen and Amadeus cases in Chapter 5.

alleged that Pilkington's territorial and use restrictions insulated its U.S.-based licensees from foreign-based competition. The challenged conduct was in fact the arrangement between Pilkington and its U.S. licensees, even though Pilkington no longer had enforceable intellectual property rights to warrant such restrictions.<sup>7</sup> Pilkington signed a consent decree that prohibited the company from enforcing its territorial and use restrictions and also obliged the firm to publicize that its technology was in the public domain.<sup>8</sup>

In two cases in the late 1980s, the threat of Justice Department extraterritorial enforcement appears to have been enough to encourage several Japanese firms charged with bid-rigging at a U.S. military to settle and pay substantial fines. In 1987 the United States discovered that Japanese construction companies were submitting rigged bids to the U.S. Navy for construction projects at its base in Yokosuka. The Navy turned its findings over to the Japan Fair Trade Commission, which fined the construction firms. The United States demanded damages from the Japanese companies and informed those with U.S. subsidiaries that it was contemplating action in the United States against them. Soon after, virtually all of the companies agreed to settle.<sup>9</sup>

A similar story was played out a few years later, when the United States discovered in November 1989 that 12 Japanese telecommunications companies submitted rigged bids on 27 contracts awarded by the Air Force at its Yokota airbase. The findings were again turned over to the JFTC, which imposed fines and issued administrative warnings. The Department of Justice again threatened legal action against the companies and their U.S. subsidiaries. Soon after, the companies agreed to settle.<sup>10</sup>

### **Private Antitrust Litigation Against Foreign Export Restraints**

The Advisory Committee has also considered the extent to which private litigation can serve as a meaningful tool to open markets. Two private antitrust cases reviewed by the Supreme Court have delineated the reach of the antitrust laws against export restraints. In *Continental Ore Co. v. Union Carbide and Carbon Corp.*,<sup>11</sup> the Supreme Court broadly construed the antitrust laws to find

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<sup>7</sup> See, e.g., Michael H. Byowitz, *The Unilateral Use of U.S. Antitrust Laws to Achieve Foreign Market Access: A Pragmatic Assessment*, 1997 FORDHAM CORP. L. INST. 21, 30 (B. Hawk, ed. 1993).

<sup>8</sup> 1994-2 Trade Cas. (CCH) at ¶70,842.

<sup>9</sup> U.S. Department of Justice Press Release 89-420, "Justice Dept. Announces Payment in Japanese Bid Rigging Case" (December 19, 1989).

<sup>10</sup> U.S. Department of Justice Press Release #91-178, "NEC Subsidiary will pay U.S. \$34 Million to Settle Bid-Rigging Scheme" (May 9, 1991); "Japanese Communications Contractors Settle U.S. Price Fixing Accusations, 62 Antitrust & Trade Reg. Rep. (BNA) No. 1554, at 269 (Feb. 27, 1992) cited in Marina Lao, *Jurisdictional Reach of the U.S. Antitrust Laws: Yokosuka and Yokota, and "Footnote 159" Scenarios*, 46 RUTGERS L. REV. 821, 849, fn. 142 (1994).

<sup>11</sup> *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962).



liability where producers of mineral ore prevented a U.S. competitor from selling in Canada. In *Continental Ore*, the plaintiff Continental Ore, a buyer and seller of metals, alleged that the defendants monopolized and attempted to monopolize trade and commerce in the metals ferrovanadium and vanadium oxide. As an element of the conspiracy, Continental alleged that a subsidiary of one of the defendants, which had been appointed by the Canadian government as its exclusive wartime agent for the purchase and allocation of vanadium for Canadian industries, had eliminated Continental entirely from the Canadian market and divided Continental's market solely between defendants. The trial court excluded evidence that demonstrated how Continental had been excluded from the Canadian market, arguing that the matter was wholly within the control of the Canadian government. After a verdict was returned for defendants, the Ninth Circuit Court of Appeals affirmed the trial court's decision to exclude the evidence.

The Supreme Court reversed the Ninth Circuit decision and held that Continental's offer of proof was relevant evidence of a Sherman Act violation. "A conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries," the Court said.<sup>12</sup> The Court relied on *United States v. Sisal Sales*,<sup>13</sup> a case in which U.S. corporations sought to monopolize the importation and sale of sisal into the United States, a product that was available only from Mexico. The defendants' control of sisal production was aided by discriminatory legislation of Mexico, which established an official agency as the sole buyer of sisal from the producer; one of the defendants was the exclusive selling agent for the governmental authority. In that case the Supreme Court held that "The United States complain of a violation of their laws within their own territory by parties subject to their jurisdiction, not merely of something done by another government at the instigation of the parties."<sup>14</sup> In a similar vein, the Supreme Court in *Continental Ore* found that the plaintiff's evidence would have shown that the exclusionary conduct in Canada was taken without any indication that the Canadian Government approved or would have approved of efforts to monopolize the sale and production of vanadium. Furthermore, the Court said, nothing indicated that Canadian law compelled discriminatory purchasing.<sup>15</sup> The Court remanded the case to the trial court for jury to determine whether the loss of Continental's Canadian business was a result of the alleged conspirators.

Another notable Supreme Court case that addresses the reach of the U.S. antitrust laws to outbound conduct is *Zenith Radio Corporation v. Hazeltine Research Inc.*<sup>16</sup> Sued for patent

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<sup>12</sup> 370 U.S. at 704.

<sup>13</sup> *United States v. Sisal Sales*, 274 U.S. 268 (1927).

<sup>14</sup> 274 U.S. at 276.

<sup>15</sup> 370 U.S. at 706-7.

<sup>16</sup> *Zenith Radio Corporation v. Hazeltine Research Inc.*, 395 U.S. 100, 89 S.Ct. 1562 (1969).



infringement by Hazeltine Research Inc. (HRI), Zenith filed a counterclaim alleging that Hazeltine engaged in a conspiracy with foreign patent pools in the Canadian, English and Australian markets to refuse to license to Zenith and others seeking to export American-made radios and televisions into those markets. The district court found for Zenith on the counterclaim and issued an injunction against HRI's participation in conspiracies restricting Zenith's trade in foreign markets. The Court of Appeals reversed, finding that the foreign pools had not damaged Zenith within the four year damages limitation period preceding its claim. The Supreme Court reinstated the district court's findings as to the Canadian pool and affirmed the Court of Appeals findings as to the activities of the English and Australian pools.

In a footnote, the Supreme Court accepted the district court's findings that the HRI's conspiracy with the Canadian patent pool to deny patent licenses to companies seeking to export American-made goods to Canada violated the Sherman Act. "Accepting these findings, we have no doubt that the Sherman Act was violated," the Court wrote. "Once Zenith demonstrated that its exports from the United States had been restrained by pool activities, the treble-damage liability of the domestic company participating in the conspiracy was beyond question."<sup>17</sup>

In another leading private antitrust case involving outbound restraints, *Daishowa International v. North Coast Export Co.*,<sup>18</sup> a U.S. association of lumber companies challenged an agreement by Japanese paper manufacturers to depress the prices paid for wood chips and to boycott American producers who refused to comply with the Japanese terms of purchase.<sup>19</sup> Although the Japanese producers claimed that they were acting together to counter the joint selling agreement of the U.S. association, the U.S. district court in northern California held that the complaint stated a cause of action and granted an injunction against the boycott.

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<sup>17</sup> 395 U.S. at 113, fn. 8, citing *Timken Roller Bearing v. U.S.*, 341 U.S. 593, 599 (1951); *Continental Ore Co. v. Union Carbide Corp.*, 370 U.S. 690, 704 (1963). For examples of private outbound restraint cases where courts did not find subject matter jurisdiction, see e.g., *National Bank of Canada v. Interbank Card Association*, 666 F.2d 6 (2d. Cir. 1981) (Termination of a Canadian bank as a credit card bank in Canada could not be foreseen to have any appreciable anticompetitive effects on U.S. commerce and, thus, jurisdiction did not exist under the Sherman Act); *Montreal Trading Ltd. v. Amax Inc.*, 661 F.2d 864, 870-71 (10<sup>th</sup> Cir. 1981) (U.S. courts had no jurisdiction over suit by Canadian corporation alleging that several Canadian subsidiaries of U.S. potash producers engaged in a concerted refusal to sell Canadian potash for delivery in Canada. The Canadian corporation did not show more than a speculative and insubstantial effect on U.S. commerce and comity concerns outweighed any effect on U.S. commerce.)

<sup>18</sup> 1982-2 Trade Cas. (CCH) ¶ 64,774 (N.D. Cal. 1982).

<sup>19</sup> The association engaged solely in the export of wood chips and qualified for an exemption from the Sherman Act, provided for in the Webb-Pomerene Act.



## **ANNEX 6-A**

### **U.S. Antitrust Technical Assistance Programs**





## ANNEX 6-A

### Summary of Technical Assistance by United States Antitrust Authorities

U.S. technical assistance is provided on a bilateral, multilateral, or regional basis. Bilateral assistance usually features long-term (periods of months or years) or short-term (weeks) in-country visits by senior legal and economic staff from the U.S. Department of Justice Antitrust Division and the U.S. Federal Trade Commission; the visits focus on specific concerns of the recipient agency through one-on-one discussions, workshops, and lectures. In-country visits often lead to ongoing *informal* follow-up consultations, often by telephone, fax, or e-mail. The United States also sponsors foreign agency staff in study visits (internships) to U.S. antitrust authorities. Technical assistance on a multilateral or regional basis is usually carried out through agency staff participation in conferences and symposiums, including many sponsored annually by organizations such as the Organisation for Economic Cooperation and Development (OECD), the World Bank, and the U.N. Conference on Trade and Development (UNCTAD).

Programs are tailored to meet the needs of assistance recipients. A significant focus involves conducting staff training on specific methods of competition analysis, investigative techniques, and prosecutorial or enforcement skills and procedures. Other efforts involve educating policymakers, the judiciary, the business community, and the general public about the role of competition policy in promoting the operation of markets and protecting consumers against anticompetitive interests; advising on writing or implementing competition laws and related regulations or policies; helping the recipient antitrust authority to define its role in initiating investigations; or providing consultative assistance on regulations and amendments to existing competition law that will enhance its enforcement efforts. Sometimes U.S. assistance occurs in the context of recipient nations' efforts to deregulate or restructure regulated industries, and accordingly antitrust agency staff with expertise in competition issues in the regulated industry will be assigned to provide assistance. This technical assistance is distinct from any the foreign government may receive from another U.S. agency that has regulatory expertise, since the relevant regulatory authority in the foreign government, as in the U.S., likely operates in a separate ministry from the competition authority, and is primarily concerned with aspects other than competition issues.





ANTITRUST DIVISION INTERNATIONAL TECHNICAL ASSISTANCE PROGRAM <sup>1</sup>						
Fiscal Year	Total Expenditures	Total Number of Missions <sup>2</sup>	Total Number of Advisors <sup>3</sup>	Foreign Nationals Trained in the United States	International Technical Assistance Beneficiaries	
1998	\$479,036	20	19	10	Africa, Asia, Central and Eastern Europe, Latin America & the Caribbean, Middle East, New Independent States, Western Europe	
1997	\$539,217	25	17	13	Australia, Central and Eastern Europe, Latin America & the Caribbean, New Independent States	
1996	\$1,357,900	29	20	26	Central and Eastern Europe, Latin America & the Caribbean	
1995	\$967,800	26	21	14	Central and Eastern Europe, Latin America & the Caribbean, New Independent States	
1994	\$754,774	43	25	13	Africa, Central and Eastern Europe, East Asia & the Pacific, Latin America & the Caribbean, New Independent States	
1993	\$626,111	24	15	10	Central and Eastern Europe, Latin America & the Caribbean, New Independent States	
1992	N/A	33	25	9	Central and Eastern Europe, Latin America & the Caribbean	
1991	N/A	11	9	N/A	Central and Eastern Europe, New Independent States (Soviet Union)	
1990	N/A	3	2	N/A	Central and Eastern Europe	

Prepared by the U.S. Department of Justice Antitrust Division, Executive Office (January 2000)

1. Information contained herein reflects best information available on technical assistance that the Antitrust Division has furnished to foreign jurisdictions from fiscal year ("FY") 1990 - FY 1998. (Each FY runs from October 1 through September 30).
2. The total number of missions is comprised of long- and short-term missions (defined as lasting from 1-4 weeks). Approximately 86% of all missions from FY 1990 through FY 1998 were short-term. The remaining 14% were long-term missions (defined as lasting from 2-9 months).
3. An "advisor" is defined as a Department of Justice, Antitrust Division, employee or consultant who participated in one or more long-or short-term missions. Normally FTC advisors are accompanied by a complementary staff member of the U.S. Federal Trade Commission who is separately funded, usually by USAID.



U.S. FEDERAL TRADE COMMISSION TECHNICAL ASSISTANCE PROGRAM <sup>1</sup>						
Fiscal Year	Total Expenditures	Total Number of Missions <sup>2</sup>	Total Number of International Conferences	Total Number of Advisors <sup>3</sup>	Foreign Nationals Trained in the United States	International Technical Assistance Beneficiaries
1998	\$326,456	18	0	19	15	Central and Eastern Europe, Latin America & the Caribbean, New Independent States
1997	\$685,637	25	0	27	19	Central and Eastern Europe, Latin America & the Caribbean, New Independent States
1996	\$696,854	35	1	36	41	Central and Eastern Europe, Latin America & the Caribbean, New Independent States
1995	\$815,152	20	2	27	11	Central and Eastern Europe, Latin America & the Caribbean, New Independent States
1994	\$936,029	32	2	39	16	Central and Eastern Europe, Latin America & the Caribbean, New Independent States
1993	\$55,808	19	0	16	26	Central and Eastern Europe, Latin America & the Caribbean
1992	N/A	16	1	22	9	Central and Eastern Europe, Latin America & the Caribbean
1991	N/A	8	0	8	1	Central and Eastern Europe
1990	N/A	3	0	3	N/A	Central and Eastern Europe

Prepared by U.S. Federal Trade Commission (Oct. 1999)

1. Information obtained herein reflects best information available on technical assistance that the Federal Trade Commission has furnished to foreign jurisdictions from fiscal year ("FY") 1990 - FY 1998. (Each FY runs from October 1 through September 30).
2. The total number of missions is comprised of long- and short-term missions. Long-term missions are defined as 2-9 months, and short-term missions are defined as 1-4 weeks.
3. An "advisor" is defined as a FTC employee or consultant who participated in one or more long-or short-term missions. Normally FTC advisors are accompanied by a complementary staff member of the U.S. Department of Justice, Antitrust Division, who is separately funded, usually by USAID.





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